IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 65

THE UNITED STATES, PETITIONER

vs.

BINGHAMTON CONSTRUCTION CO., INC.

No. 78

BINGHAMTON CONSTRUCTION CO., INC., PETITIONER

vs.

THE UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 48525

BINGHAMTON CONSTRUCTION CO., INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed January 22, 1948

To the Court of Claims of the United States:

The petition of the plaintiff respectfully represents that:

I

1. The plaintiff is, and at all times hereinafter referred to was, a corporation organized and existing under the laws of the State of New York, with its principal place of business in Binghamton, New York.

2. The plaintiff has, at all times, borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government.

2 3. On or about March 29, 1941, the United States Army Engineer Office at Binghamton, New York, invited bids for the construction of Flood Protection Project (Section No. 1) along the right bank of the Chemung River within the limits of the City of Elmira, Chemung County, New York. The plaintiff, in response to such invitation, submitted a bid in the fixed amount of $232,669.30 which, on April 29, 1941, was accepted. Pursuant to such bid and acceptance, there was subsequently executed Contract No. W-321-eng-261, dated May 14, 1941 (hereinafter referred to as the "contract"), a copy of the material portions of which is annexed hereto. Such contract was an authorized and binding obligation of the defendant.

II

4. Under the provisions of the Act of August 30, 1935, 49 Stat. 1011—the so-called Davis-Bacon Act—the contract was required to, and did, contain a provision obligating the plaintiff to pay not less than the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and me-

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chanics employed on projects of a character similar to the contract work in the territorial area in which such work was to be performed. In the Specifications for the work covered by the contract, which Specifications, dated March 29, 1941, were issued as of the date thereof in connection with the advertisement for bids as the basis upon which such bids were to be made, and which were appended to and made a part of the definitive contract, the representation was made that the Secretary of Labor had determined the prevailing wage rates in the locality; and such rates were set forth in Paragraph 1-31 of the Specifications. Among the rates so given were the following:

3

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.00
* * * * *	
Laborers, unskilled	.50
Laborers, concrete puddlers	.50
* * * * *	

5. The plaintiff, acting on the basis of the wage rates stated in the Specifications, as it was invited and entitled to do, computed and submitted its bid. Subsequent to the acceptance of such bid and after the execution of the definitive contract, the plaintiff discovered that the wage rates for the classifications of labor referred to above in Paragraph 4 were not in fact the prevailing rates for such labor as determined by the Secretary of Labor, neither as of the time of the issuance of the Specifications, the acceptance of the bid, nor the execution of the contract; and that the Secretary of Labor in at least one instance, namely, on February 25, 1941, had determined the prevailing wage rates in the locality for these classifications of labor on a similar project to be higher than those stated in the Specifications of March 29, 1941, as follows:

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.125
* * * * *	
Laborers, unskilled	.55
Laborers, concrete puddlers	.55
* * * * *	

Such determination of the Secretary of Labor was still in effect and unmodified on March 29, 1941, and the Specifications issued by the defendant on such latter date were defective and misleading in failing to reflect such determination.

4 6. Upon commencing work under the contract, the plaintiff was unable to procure labor of these classifications at the rates stated in the Specifications, and was in fact obliged to pay higher rates, as follows:

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Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.125
• • • • •	
Laborers, unskilled	.625
Laborers, concrete puddlers	.625
• • • • •	

7. The plaintiff was entitled to, and did, rely upon the wage rates stated in the Specifications as being in accordance with the most recent determinations by the Secretary of Labor of the wage rates prevailing for the corresponding classes of workmen on similar projects in the area; and was entitled to, and did, prepare and submit its bid on this assumption. When, after the acceptance of its bid and the execution of the contract, it discovered the error in the representations made to it, it was entitled to be reimbursed at the higher rates which it was required to pay in order to perform the contract work, to the extent that such higher rates were equivalent to the prevailing rates fixed by the Secretary of Labor in her determination of February 25, 1941. The plaintiff duly requested such reimbursement by appropriate adjustment in the contract price, but the defendant wrongfully denied such request.

8. The failure of the defendant so to adjust the contract price has resulted injury and damage to the plaintiff in the amount of $8,048.04, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

5 III

9. The 62½¢ hourly wage rate with respect to laborers (both unskilled and concrete puddlers) which the plaintiff was obliged in fact to pay in order to procure labor to perform the contract work was, in fact, the prevailing hourly rate in the locality at the time of the issuance of the Specifications, the acceptance of the bid, and the execution of the contract; and the 55¢ rate fixed in the Secretary of Labor's determination of February 25, 1941, was less than the actual prevailing rate at such times. The failure of the defendant to make an accurate representation in the Specifications to the plaintiff with respect to the hourly rate actually prevailing at the time of the issuance of the Specifications, was a breach of the defendant's obligation to state such prevailing rates correctly and not to mislead the plaintiff by representing that the prevailing rates were lower than they were in fact. Because of the fact that the plaintiff was obliged to pay the 62½¢ prevailing rate in order to procure labor to perform the contract work, the plaintiff was entitled, in addition to the claim hereinabove described under Section II, to be further reimbursed for the dif-

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ference between the 55¢ rate for laborers fixed in the Secretary of Labor's determination of February 25, 1941, and the 62½¢ hourly rate actually prevailing at the time of the issuance of the Specifications, the acceptance of the plaintiff's bid, and the execution of the contract, which 62½¢ rate the plaintiff was required to, and did, pay. Plaintiff duly requested such reimbursement but the defendant wrongfully denied such request.

10. The failure of the defendant to make such reimbursement has resulted in injury and damage to the plaintiff in the
6 amount of $5,863.79, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

IV

11. Paragraph 7–05 (d) of the Specifications contained a detailed description of the manner in which, and the materials with which, the concrete involved in the construction was to be finished. In submitting its bid, the plaintiff was entitled to, and did, rely upon the statements made in said Paragraph 7–05 (d) in computing the cost to it of finishing such concrete. During the performance of the contract, the defendant ordered and required the plaintiff to finish the concrete in a manner and with materials not specified in, or reasonably contemplated by, the Specifications, with the result that plaintiff was subjected to unauthorized and unanticipated costs, reimbursement of which was duly requested by the plaintiff but wrongfully denied by the defendant.

12. The defendant's wrongful conduct in this respect has resulted in injury and damage to the plaintiff in the amount of $7,082.74, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

V

13. Under the provisions of Paragraph 3–06 of the Specifications, the plaintiff was required to furnish certain sheeting and shoring. Subparagraph (c) of said Paragraph 3–06 provided that such sheeting and shoring was to be measured "by the square foot of protected area," and subparagraph (d) of said Paragraph 3–06 provided that payment for sheeting and shoring would
7 be made at the contract unit price of Sixty-five Cents ($0.65) per square foot, as stated in the Schedule of Payments annexed to and made a part of the contract.

14. In computing its bid, the plaintiff was entitled to, and did, rely upon the statements contained in Paragraph 3–06 as to the measurement of sheeting and shoring by the square foot of protected area, and computed its bid on the basis of square footage

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of the area required to be protected. During the performance of the contract, however, the defendant refused to pay the plaintiff for sheeting and shoring in accordance with the square footage of the protected area, and, instead, followed an arbitrary and unauthorized method of measurement, not in accordance with the Specifications, which resulted in the underpayment of the plaintiff for sheeting and shoring. Although the plaintiff duly requested payment of the proper amount as contemplated by the contract, such request was wrongfully refused by the defendant.

15. The wrongful conduct of the plaintiff in this respect resulted in injury and damage to the plaintiff in the amount of $14,110.85, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

VI

16. Although the plaintiff duly and formally protested to the Contracting Officer the wrongful actions complained of above, the Contracting Officer refused to afford the plaintiff any relief, and, upon appeal to the Chief of Engineers, was upheld by the latter. Appeals by the plaintiff to the War Department Board of Contract Appeals were, on January 14, 1947, dismissed for an
8 asserted lack of jurisdiction. Except as hereinbefore referred to in this Paragraph 16, no action on the claims has been taken by Congress or by any department of the government.

17. The plaintiff is justly entitled to recover from the defendant the aggregate sum of $35,105.22, after allowing all just credits and offsets.

18. The plaintiff has made no assignment or transfer of the claims or any part thereof, and no persons other than the plaintiff are owners of the claims or of any interest therein.

Wherefore, it is respectfully prayed that judgment be granted against the defendant and in favor of the plaintiff for the sum of $35,105.22, together with such costs as may be properly allowable to it in respect of this suit.

DOUGLAS, PROCTOR, MACINTYRE & GATES,
Attorneys for the Plaintiff, Office and Post Office Address, 730 Southern Building, Washington 5, D. C.

9 [*Duly sworn to by Malcolmn A. MacIntyre; jurat omitted in printing.*]

10 *Exhibit to Petition*

U. S. Standard Form No. 23—Rev.

Approved by the Secretary of the Treasury. Revised September 17, 1938. Contract No. W-321-eng-261. Dated May 14, 1941.

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CONTRACT

(Construction)

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
Binghamton, New York
(Department)

BINGHAMTON CONSTRUCTION CO. INC.
MARINE MIDLAND BANK BUILDING
Binghamton, New York
(Contractor)

Contract for Elmira Flood Protection Project (Section No. 1), Amount, $232,669.30.

Place, Right Bank of Chemung River, Elmira, New York.

CONTRACT FOR CONSTRUCTION

This contract, entered into this 14th day of May 1941, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Binghamton Construction Co., Inc., a corporation organized and existing under the laws of the State of New York, of the city of Binghamton, in the State of New York, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Statement of work.—The contractor shall furnish the materials, and perform the work for construction of Flood Protection Project (Section No. 1) along the right bank of the Chemung River, within the limits of the City of Elmira, Chemung County, New York, for the consideration shown on Schedule of Payments attached hereto, in strict accordance with the
11 specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications: No. 321–41–15 War Department Appropriation: 21X3113 Flood Control, General Flood Protection Project (Section No. 1) at Elmira, New York, dated U. S. Engineer Office, Binghamton, New York, March 29, 1941, with Addendum No. 1, dated April 12, 1941, attached thereto.

Schedules: Payments, in three (3) sheets.

Progress chart marked "Major Operations of Elmira Flood Protection Section #1 Submitted by Binghamton Constr. Co."

Drawings: Maps and drawings marked "Southern New York Flood Control Project, Elmira Flood Protection Project, Section

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number one, Elmira, New York, in 32 sheets, designated in paragraph 1–04 of the specifications cited, as modified by Addendum No. 1.

The work shall be commenced within ten (10) calendar days after the date of receipt by the contractor of notice to proceed and shall be completed within five-hundred and fifty (550) calendar days after said date of receipt of notice to proceed.

ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

* * * * *

ARTICLE 17. Rate of wages (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections
12 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of

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wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

* * * * *

13 In witness whereof, the parties hereto have executed this contract as of the day and year first above written.

Approved June 3, 1941.

THE UNITED STATES OF AMERICA,
By (S) J. C. Marshall,
J. C. MARSHALL,
Major, Corps of Engineers,
District Engineer (*Official Title*).

(S) J. N. Hodges,
J. N. HODGES,
Colonel, Corps of Engineers,
Division Engineer, North Atlantic Division.

BINGHAMTON CONSTRUCTION CO. INC.,
Contractor.

[CORPORATE SEAL] By (S) DONALD G. DAVIS,
Pres., Marine Midland Bank Bldg., Binghamton, New York (*Business Address*).

Two witnesses:

(S) HELEN G. CAMERON.
(S) JOAN MINNOW.

I, Joseph J. Cox, certify that I am the secretary of the corporation named as contractor herein; that Donald G. Davis who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL] (S) JOSEPH J. COX,
Secretary.

Exhibit to Petition

14 This project is authorized by the act of June 22, 1936 (Public No. 738, 74th Congress (as amended by the act approved June 28, 1938 (Public No. 761, 75th Congress).

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No. 321-41-15

U. S. ENGINEER OFFICE,
Binghamton, New York, March 29, 1941.

WAR DEPARTMENT

Appropriation: 21X3113 Flood Control, General Flood Protection Project (Section No. 1) at Elmira, New York.

SPECIFICATIONS

Section I. General Provisions

1-01. Location.—The site of the proposed work is along the right bank of the Chemung River within the limits of the City of Elmira, Chemung County, New York.

1-02. Work to be Done.—(a) The work provided for herein is authorized by the act approved June 22, 1936 (Public No. 738, 74th Congress) as amended by the act approved June 28, 1938 (Public No. 761, 75th Congress).

(b) The work to be done consists of furnishing all plant, labor, equipment, and materials, and performing all work required for the construction of Flood Protection Project (Section No. 1) at Elmira, New York, and all appurtenant works, complete in strict accordance with these specifications and maps and contract drawings forming a part hereof. It will consist of the following major items:

(1) Construction of levee embankments.
(2) Construction of new concrete walls.
(3) Raising an existing wall.
(4) Construction and alteration of sewers, culverts, drains, and manholes.

* * * * *

15 1-31. Wage and Labor Provisions.—(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.00
Cement finishers, structures	1.50
Electricians	1.12½
Laborers, unskilled	.50
Laborers, concrete puddlers	.50
Mechanics, heavy equipment	1.00
Oilers, heavy equipment	.85
Operators, air compressors, 160 cubic feet and under	.85
Operators, air compressors, over 160 cubic feet	1.00

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Designation	*Wage rate, hourly*
Operators, batcher plant	$0.60
Operators, bulldozers	1.00
Operators, cranes and draglines	1.50
Operators, clamshells	1.50
Operators, hand held rock drill	.75
Operators, mixers, under 21E	1.00
Operators, mixers, 21E and over	1.50
Operators, pump, 4 inc. and under	.75
Operators, pump, over 4-in	1.00
Operators, piledrivers	1.50
Operators, shovels	1.50
Operators, tractors	.85
Operators, wagon drill, pneumatic	.90
Powdermen (blasters)	.75
Reinforcing rodsetters	1.50
Truck drivers	.55

Welders—Receive the rate prescribed for craft performing operation to which welding is incidental.

The above list of wages shall be posted by the contractor in a conspicuous place on the work.

16 (b) In the event that it becomes necessary to employ any laborer or mechanic whose work is not covered by any of the classifications in the schedule, he shall be paid not less than the prevailing rate of wages in the locality where the work is done for the class of work done by him. Such rate shall be determined by the contracting officer. In case any dispute arises as to what are the prevailing rates of wages for work of a similar nature that cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination, and his decision shall be conclusive on all parties hereto.

* * * * *

1–38. Approval.—This contract shall be subject to the written approval of the Division Engineer, North Atlantic Division, and shall not be binding until so approved.

* * * * *

3–06. Sheeting and Shoring—(a) General.—The contractor shall furnish and place such sheeting, shoring, bracing, or other approved supports as are indicated on the contract drawings or directed by the contracting officer for the protection of the work or adjoining property. The right is reserved to order the installation of sheeting and shoring where its use is considered advisable for the safety of the work, and to require such sheeting and shoring to remain in place when its removal is considered inadvisable.

(b) Procedure.—All sheeting and shoring shall be designed by the contractor and approved by the contracting officer prior to installation, but such approval by the contracting officer shall not relieve the contractor of sole responsibility for damages resulting from the inadequacy or lack of any sheeting and shoring. The sheeting and shoring shall be built to provide adequate clearances

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for minimum interference with construction operations, proper bracing for stability, and safe conditions around the work. If, in the opinion of the contracting officer, any methods or measures of the contractor constitute a hazard in any way or are otherwise improper or inadequate, the contracting officer will notify the contractor of that fact in writing. If the contractor fails to provide immediately such remedial measures as are deemed necessary by the contracting officer, such measures will be provided by the contracting officer at the expense of the contractor. When sheeting and shoring have served their purpose and their removal is approved by the contracting officer, they shall be removed and disposed of. Whether sheeting and shoring are removed or left in place, all cavities shall be adequately filled. When approved by the contracting officer, sheeting and shoring may be used in lieu of excavation to full pay lines.

17

(c) Measurement.—Sheeting and shoring will be measured by the square foot of protected area.

(d) Payment.—Except as specified below, payment for all costs of furnishing and placing sheeting and shoring indicated on the contract drawings or directed by the contracting officer, and of its removal and disposal when not left in place, will be made at the contract unit price for "Sheeting (Including Shoring)," Item No. 7. Where sheeting and shoring are used at the contractor's option and with the approval of the contracting officer, separate payment will not be made for the sheeting and shoring, but payment will be made for excavation to the pay lines shown on the contract drawings as though the cut had been made to such pay lines.

* * * * *

7–05. Details of Construction.—

(d) Finishing.—Immediately following removal of forms, all form tie holes shall be filled, protruding fins or other surface irregularities removed by carborundum stone and all other defects repaired. Where necessary to obtain a suitable surface finish, the contractor shall remove the form and finish the surfaces when and as directed by the contracting officer at no additional cost to the United States. The curing specified in subparagraph 7–05 (e) following shall be temporarily suspended during such repairing or finishing as directed. The finished surfaces shall be free from sand streaks or other defects and the plastering over of such surfaces will not be permitted. Defective concrete shall be repaired by cutting out the unsatisfactory material and placing new concrete which shall be formed with keys, dovetails, and anchors to attach it securely to the other work. This concrete shall be drier than the usual mixture and shall be thoroughly tamped into place. All surfaces of concrete, not covered

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by forms, that are not to be covered by additional concrete or backfill shall have a wood float finish without additional mortar, and shall be true to elevations as shown on contract drawings. Striking-off and finishing shall follow closely the placing operation in order to insure completion before the initial set has taken place. The contractor will not be permitted to start a pour unless a sufficient number of qualified finishers are available to fulfill the above requirements. Care shall be taken to see that all excess water is removed before making the finish. Other surfaces shall be brought to the specified finished elevation and left true and regular as approved by the contracting officer. Where considered necessary by the contracting officer, or where indicated on the drawings, joints shall be made carefully with a jointing tool. Every precaution shall be taken by the contractor to protect finished surfaces from stains or abrasions. No fire shall be permitted in direct contact with any concrete at any time. Concrete surfaces or edges likely to be injured during the construction period shall be properly protected by leaving the forms in place or by erecting covers satisfactory to the contracting officer.

* * * * *

19 *General traverse*

Filed March 2, 1948

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) H. G. MORISON,
Acting Assistant Attorney General.

ETF, JJS.

21 In the United States Court of Claims

[Title omitted]

Report of commissioner

Filed June 5, 1951

To the Honorable the Chief Judge and Associate Judges of the United States Court of Claims:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. Plaintiff is, and at all times material herein has been, a corporation organized and existing under the laws of the State of New

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York with its principal office and place of business at Binghamton, New York. Since its formation in 1929, it has been engaged in business as a general contractor.

2. On March 29, 1941, defendant acting by and through the War Department's Corps of Engineers' Office at Binghamton, New York, invited bids for the construction of Flood Protection Project (Section No. 1) along the north bank of the Chemung River, within the limits of the city of Elmira, Chemung County, New York. In response to said invitation, plaintiff submitted a bid based upon a unit price applied to the various operations involved in the performance of the work in the total sum of $232,669.30. This bid was accepted by defendant on May 14, 1941. On that date plaintiff and defendant entered into a written contract, No. W–321–eng–261, which was approved June 3, 1941. On June 5, 1941, defendant gave plaintiff a formal notice to proceed with the work. Actual work commenced on the site of the job on June 3, 1941.

3. The contract was performed by plaintiff, and it has been paid the contract price, as adjusted, for change orders with
22 the exception of $100 which plaintiff instructed the District Engineer to withhold, and plaintiff has refused to accept said $100 from defendant on advice of its counsel.

4. Plaintiff sues for the sum of $35,105.42, the total of three separate claims, as follows:

Claim for reimbursement of wage rates paid to carpenters, laborers, and concrete puddlers	$13,911.83
Claim as regards measuring of sheeting and shoring	14,110.85
Claim for finishing of concrete	7,082.74
Total	35,105.42

Each claim will be discussed separately.

WAGE RATES

5. Before bidding, plaintiff had a copy of the specifications. Section 1–31 of such specifications reads, insofar as here pertinent, as follows:

"1–31. Wage and Labor Provisions.—(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.00
• • • • •	
Laborers, unskilled	.50
Laborers, concrete puddlers	.50
• • • • •	

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6. Article 17 of the contract reads as follows:

"ARTICLE 17. Rate of wages (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

"(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contract-
23 ual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; an the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

"(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby."

7. On January 31, 1941, the Secretary of Labor furnished to the Corps of Engineers at its request, for inclusion in the contract specifications, the schedule of minimum wages in the Elmira area. Such schedule was included in the specifications and is set out in finding 5.

8. On June 16, 1941, plaintiff advised the District Engineer (who was the contracting officer) that the minimum wage rates provided in the contract specifications were less than the rates currently prevailing in the Elmira locality for carpenters, labor-

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ers (unskilled), laborers (concrete puddlers), and truck drivers.

9. The District Engineer replied on June 27, 1941, stating that the minimum wage rates were determined in strict accordance with the applicable law and regulations, and that he could not afford relief for any differences between wage rates then prevailing in the area and the minimum rates required by the contract specifications.

24 10. Plaintiff protested this decision to the Chief of Engineers under date of July 10, 1941, and on August 5, 1941, plaintiff's appeal was denied by the Chief of Engineers in part as follows:

"There is no authority in law for this office to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions of the above cited act [49 Stat. 1011]. Therefore, I find that the wage rates as established by the Secretary of Labor, and incorporated in the contract specifications, were the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work."

11. Plaintiff under date of February 20, 1943, asked defendant to reconsider its appeal regarding minimum wage rates, and this was responded to by letter dated April 13, 1943, from the Chief of Engineers, in part as follows:

"A determination as to the accuracy of the specified wages is not necessary to a decision in this case. The contract by Article 17 and by paragraph 1–31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract. No reason has been shown which would warrant modification of the previous decision dated August 5, 1941."

12. On March 4, 1941, the Secretary of Labor furnished to the Public Buildings Administration of the Federal Works Agency a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira, New York. The prevailing wage rates shown therein as far as here material were as follows:

Classification	*Hourly rate*
Carpenters, journeymen	$1.125
Laborers, unskilled	.55

13. At the time plaintiff began work on the site, which as indicated in finding 2 was June 3, 1941, it had to pay $0.625 per
25 hour for laborers and $1.125 per hour for carpenters. This

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was the union rate effective April 1, 1941, and the plaintiff employed only union members. Sometime in 1942, there was an increase in union rates for carpenters from $1.125 to $1.25 per hour, and for laborers from $0.625 to $0.75 per hour. Although plaintiff paid such increased wage rates, it is not claiming in this suit any excess over the laborers' rate of $0.625 and the carpenters' rate of $1.125 except such overtime as related to the latter rates.

14. Although the plaintiff's president denied that he had any knowledge of the prevailing rates for wages in Elmira at the time of the submission of plaintiff's bid, and states that he relied upon the schedule of minimum wage rates included in the bidding specifications, he could have, with very little effort and the exercise of reasonable prudence, ascertained not only the prevailing rates, but the impending increase in union rates for carpenters and laborers which was effective on April 1, 1941.

15. Since plaintiff has lost some of its original payroll records (which would identify the class of work performed by an employee), it is not possible to verify plaintiff's claim for $13,911.83 from its books and records. It will be possible, however, in the event that the Court should conclude that plaintiff is entitled to recover, to reconstruct such payrolls for carpenters and laborers and to establish with reasonable accuracy the amount of such recovery. For the foregoing reason, no finding is made as to the amount of plaintiff's damage on the claim for reimbursement of wage rates for carpenters and laborers over and above the minimum wage rates set out in finding 5.

SHEETING AND SHORING

16. The contract specifications provide in part as follows:

"Section I

"1-14. Work Areas.—* * *

"(b) The contractor shall be responsible for trespassing upon, or damage to, public and private lands and roads, bridges, buildings, chimneys, and utilities in or adjacent to the work and access areas resulting from any act or omission on his part, including damage caused by disturbance of foundations while conducting any
26 operation within the work area. The contractor shall take special precautions to prevent injury to existing structures while working in the vicinity of the Hygeia plant, Brand building, greenhouse, gas regulation house, private dwellings, and all other buildings and structures located at or close to the edge of the work area. He shall take similar precautions in the vicinity of the pole line crossing the levee at West Hudson Street, the water

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main at approximate Station 176+37, all power facilities at the Hygeia plant, and any other utilities which will not be relocated.

* * * * *

"(d) The garage and other property of the Hygeia Refrigerating Company are within the work area, and the activities of this company will be carried on during construction of the project. The contractor shall cooperate with this company during all construction operations in order to preserve its access and permit its operations to be conducted with a minimum of interference by the contractor. The contractor shall perform the necessary construction on the company's property in the least practicable time. He shall provide bracing or other protection satisfactory to the contracting officer for the garage wall against which the new wall is placed. The garage and other property within the work area shall be restored to a condition satisfactory to the contracting officer upon completion of the permanent work in that area.

* * * * *

"Section III

"3.03. Excavation—Common. * * *

"(b) Procedure—(1) General.—Excavation—Common shall be performed in accordance with subparagraph 3–01 (c). Excavation around bridge piers and abutments, existing walls, buildings, chimneys, transformers, power lines, utilities, sewers, culverts, and other existing structures shall be executed with all due precautions, satisfactory to the contracting officer, for safeguarding the structures. (See paragraphs 1–14.) Where special work is required to prevent undermining existing structures, it shall be done in accordance with detailed plans prepared by the contractor and approved by the contracting officer, but such approval shall not relieve the contractor of responsibility for damages which may result from the failure of the temporary protection. Where excavation operations endanger the stability of existing or new structures, sheeting and shoring shall
27 be installed at the locations indicated on the drawings or directed by the contracting officer. The contractor shall be responsible for safety of such structures. (See subparagraph (3) below and paragraph 3–06.) * * *

* * * * *

"(3) Sewers, Culverts, and Drains.—The contractor shall furnish and install sheeting and shoring in all trenches where the depth exceeds 6 feet. * * *

* * * * *

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"3-06. Sheeting and Shoring—(a) General.—The contractor shall furnish and place such sheeting, shoring, bracing, or other aproved supports as are indicated on the contract drawings or directed by the contracting officer for the protection of the work or adjoining property. The right is reserved to order the installation of sheeting and shoring where its use is considered advisable for the safety of the work, and to require such sheeting and shoring to remain in place when its removal is considered inadvisable.

(b) Procedure.—All sheeting and shoring shall be designed by the contractor and approved by the contracting officer prior to installation, but such approval by the contracting officer shall not relieve the contractor of sole responsibility for damages resulting from the inadequacy or lack of any sheeting and shoring. The sheeting and shoring shall be built to provide adequate clearances for minimum interference with construction operations, proper bracing for stability, and safe conditions around the work. If, in the opinion of the contracting officer, any methods or measures of the contractor constitute a hazard in any way or are otherwise improper or inadequate, the contracting officer will notify the contractor of that fact in writing. If the contractor fails to provide immediately such remedial measures as are deemed necessary by the contracting officer, such measures will be provided by the contracting officer at the expense of the contractor. When sheeting and shoring have served their purpose and their removal is approved by the contracting officer, they shall be removed and disposed of. Whether sheeting and shoring are removed or left in place, all cavities shall be adequately filled. When approved by the contracting officer. sheeting and shoring may be used in lieu of excavation to full pay lines.

"(c) Measurement.—Sheeting and shoring will be measured by the square foot of protected area.

28 "(d) Payment.—Except as specified below, payment for all costs of furnishing and placing sheeting and shoring indicated on the contract drawings or directed by the contracting officer, and of its removal and disposal when not left in place, will be made at the contract unit price for 'Sheeting (Including Shoring),' Item No. 7. Where sheeting and shoring are used at the contractor's option and with the aproval of the contracting officer, separate payment will not be made for the sheeting and shoring, but payment will be made for excavation to the pay lines shown on the contract drawings as though the cut had been made to such pay lines."

17. The schedule of payments incorporated into the contract in suit provided in item 7 that the plaintiff was to be paid for sheeting (including shoring) on a quantity of 9,200 square feet at the rate of 65 cents per square foot, or a total of $5,980.

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18. Section I, paragraph 1–05, provides in pertinent part as follows:

"1–05. Quantities.—The following estimate of quantities is given only to serve as a basis for comparison of bids and for determining the amount of consideration of the contract. Within the limits of available funds, the contractor will be required to perform the entire quantity of work necessary to complete the work specified in paragraph 1–02 hereof, be it more or less than the amounts herein estimated.

* * * * *

"Item No. 7 Sheeting (Including Shoring) 9,200 Sq. Ft."

* * * * *

19. As the work progressed, the plaintiff placed sheeting and shoring necessary for the protection of the work as well as that necessary for the protection of existing buildings and structures. Payment was made on account of such sheeting and shoring, as well as the other work performed by the plaintiff, on monthly estimates prepared by defendant's resident engineer and given to plaintiff's superintendent together with a payment voucher for execution on behalf of plaintiff. The plaintiff executed such payment vouchers and forwarded them along with each monthly estimate for payment by the defendant's paying office. On the second such monthly estimate forwarded with a payment voucher by plaintiff, an item of 438 square feet of sheeting, including
29 shoring, appears under item 7. On subsequent monthly estimates supporting payment vouchers, under item 7 appears a figure covering additional sheeting, including shoring. The plaintiff accepted monthly payments on such payment vouchers without question as to the manner of computation of the sheeting (including shoring) item until the final estimate was received by the plaintiff showing a total of 10,152 square feet.

20. After all of the work under the contract had been performed, the defendant, through the resident inspector, forwarded proposed final estimate on January 21, 1943. On January 28, 1943, plaintiff's superintendent, Mr. Bernard Gabriel, went to the office of the District Engineer at Syracuse, New York, and conferred with a representative of that official concerning claims for additional payments on various contract items including sheeting and shoring. Following this conference, the plaintiff received a letter dated February 1, 1943, from the District Engineer in which it is stated that:

"In computing pay quantities the following methods were used by this office.

"Sheeting—Computations based on field measurements of length and height of sheeting placed."

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21. The plaintiff was paid at the rate of 65 cents per square foot for 10,152.1 square feet of sheeting and shoring. Of this amount 6,738.2 square feet was for the protection of the work, and 3,413.9 square feet was for the protection of property. The plaintiff claims that it should have been paid for 32,899 square feet, 8,094 square feet for the protection of the work, and 24,805 square feet for the protection of property.

As to the sheeting and shoring required for the protection of the work, it is plaintiff's position that the protected area was the area of side walls of trenches excavated where sheeting was placed.

The difference between the quantity of sheeting and shoring for the protection of the work claimed by the plaintiff and that allowed by the defendant is shown by defendant's Exhibit 22, which is in evidence and made a part hereof by reference, to relate to items A 1 and A 2. On all other items concerning sheeting placed for protection of the work, the allowance was as great or greater than that claimed, except for 50 square feet of sheeting claimed at the Walnut Street Bridge, which the defendant allowed under sheeting placed for the protection of property. The evidence is not satisfactory as to the measurements by which either the amount claimed or allowed was computed.

As to the sheeting and shoring required for the protection of the property, plaintiff's claim is based not upon the amount of sheeting or shoring placed, but rather upon the ground area covered by the buildings and structures so protected. The ground area of the buildings and structures which was protected by sheeting and shoring is shown below:

Ground area of buildings and structures as to which sheeting and shoring was provided

		Square feet
Brand Building	175 x 68	11,900
Hygeia Wall	315 x 6	1,890
Garage (Main St.)	54 x 60	3,240
House (Connolly Ave.)	35 x 25	875
Florist Shop (Walnut St.)	30 x 30	900
Greenhouse (Walnut St.)	240 x 25	6,000
Total		24,805

22. The plaintiff on February 9, 1943, wrote to the District Engineer requesting that the defendant recompute the allowance for sheeting and shoring.

"* * * by ascertaining the square footage of the area protected by the work performed under this item, pursuant to paragraph 3-06 subdivision (c) and that we be paid therefor at the unit price of said item. * * *"

The defendant reviewed plaintiff protests and on February 18, 1943, wrote plaintiff that the item had been measured and computed in strict accordance with the provisions of the contract

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specifications, and the contractor was invited to present additional facts or computations for consideration.

23. The plaintiff failed to accept this invitation but rather by letter dated February 24, 1943, returned a final release of claims wherein was listed an exception to the method of computing the final quantity of sheeting and shorting.

24. Receipt of the release was acknowledged by letter dated March 5, 1943, and the plaintiff was advised of his further rights of appeal under Article 15 of the contract.

25. On March 19, 1943, plaintiff appealed the decisions of the contracting officer to the Secretary of War, and on July 31, 1944, the appeal was denied. This denial reads in part as follows:

31 "You allege that the method used by the contracting officer in computing the pay quantities for sheeting (including shoring) was incorrect. Paragraph 3–06 (c) of the contract specifications states that sheeting and shoring, '* * * will be measured by the square foot of protected area.' The record shows that the pay quantities of sheeting placed adjacent to existing structures were determined by measurements to specific payment lines where such lines are shown on the drawings. Where specific payment lines were not indicated, the quantities were computed by using the length of the area actually sheeted and the difference in elevation between the top of the sheeting and the bottom elevation of the adjacent structures. The pay quantities for sheeting not placed adjacent to any existing structure were computed by multiplying the difference in elevation between the ground surface and the bottom elevation of the trench by the length of the area sheeted. You assert that because of the liability imposed by paragraph 1–14 (b) of the specifications for damages to structures in or adjacent to the work, including damages caused by disturbance of foundations, that the term 'protected area' as used in paragraph 3–06 (c) must be construed to mean the ground area occupied by the adjacent structures and that the computation of pay quantities for sheeting placed to protect such structures must be based on the area thereof. As noted above the payment lines shown on the drawings for sheeting and shoring placed adjacent to the structures clearly indicate that the parties did not intend that payment should be made on the basis of the ground area of the buildings. Furthermore, the estimates [sic] pay quantity of sheeting was only 9,200 square feet, approximately 10% less than the quantity of 10,152 square feet for which payment was made and only about 30% of the quantity for which payment is claimed. The contract does provide, as contended by you, that the quantities specified are only estimates. However, the buildings which were to be protected were clearly indicated on the contract drawings. The combined ground area of the buildings

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alone, aside from the other locations where the plans indicated sheeting was to be placed, is about 2½ times the total area for which it was estimated sheeting would be required. The payment lines indicated on the drawing and the discrepancy between the ground area of the buildings and the estimated quantity of the sheeting should have put you on notice that the Government did not intend that the pay quantities of sheeting and shoring placed adjacent to existing structures would be computed on the
32 basis of the ground area of such structures. No objection has been made of the method employed by the contracting officer in computing pay quantities for sheeting not placed adjacent to structures. As the ground area occupied by a structure has no direct relation to the cost of placing sheeting and shoring adjacent to it, there would appear to be no reason to compute the pay quantities of sheeting placed adjacent to such structures on the basis of the ground area occupied and to compute the pay quantities of sheeting not so placed on an entirely different basis. Under paragraph 1–14 (b) of the specifications you are liable for damages to land as well as to structures. If your contention that the pay quantities of sheeting placed adjacent to existing structures must be computed on the basis of the ground occupied by said structures were to prevail, it would logically follow that the pay quantities for sheeting not placed adjacent to any existing structure should be computed on the basis of the land area protected, even though such area might conceivably comprise many acres. Such as [sic] interpretation is obviously absurd. It is my finding that the methods employed by the contracting officer for computing the pay quantities of sheeting and shoring were correct."

CONCRETE FINISHING

26. Article 15 of the contract provides as follows:

"Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

Section 1–20 of the general provisions of the contract specifications provides:

"1–20. Claims, Protests, and Appeals.—(a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the

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contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections.
33 The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Chief of Engineers, whose decision shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, ruling, instructions, or decisions of the contracting officer shall be final and conclusive.

"(b) The Chief of Engineers has been designated by the Secretary of War as his duly authorized representative to make final decision and to take other action where the terms of the contract require that such decision or action shall be 'by the Head of the Department concerned or his duly authorized representative.' All appeals from decisions of the contracting officer authorized under the contract shall, therefore, be addressed to the Chief of Engineers, U. S. Army, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract."

Pertinent provisions of the contract specifications, Section VII, dealing with the subject "Concrete" are quoted below:

Section VII. Concrete

* * * * *

"7.03. Proportioning and Mixing.—* * *

"(b) Proportioning. * * *

"(2) Control.—The exact proportions of all material entering into the concrete shall be as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the actual amounts of all material entering into the concrete. The proportions will be changed whenever, in the opinion of the contracting officer, such change becomes necessary to obtain the specified strength and the desired density, uniformity and workability, and the contractor will not be compensated because of such changes, except for an increase in the specified minimum unit paste content, as provided herein as follows: In the event it is determined by the contracting officer that concrete of the desired quality cannot be obtained with the

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specified gradation of aggregates conforming fully to the specifications and the specified minimum unit cement content,
34 he may direct an increase in the unit paste content by the addition of Portland cement, in which case compensation will be made therefor at the cost to the contractor of the cement delivered f. o. b. carrier at the site of the work, plus $0.40 per barrel.

* * * * *

"7-05. Details of Construction.—(a) Forms.—* * *

"(4) Removal.—Forms shall not be removed without the approval of the contracting officer, and all removal shall be accomplished in such manner as will prevent injury to the concrete. Forms shall not be removed from walls and vertical faces before the expiration of 2 days, except when specifically authorized by the contracting officer. When, in the opinion of the contracting officer, conditions on the work are such as to justify it, forms may be required to remain in place for longer periods.

* * * * *

"(d) Finishing.—Immediately following removal of forms, all form tie holes shall be filled, protruding fins or other surface irregularities removed by carborundum stone and all other defects repaired. Where necessary to obtain a suitable surface finish, the contractor shall remove the forms and finish the sufaces when and as directed by the contracting officer at no additional cost to the United States. The curing specified in subparagraph 7-05 (e) following shall be temporarily suspended during such repairing or finishing as directed. The finished surfaces shall be free from sand streaks or other defects and the plastering over of such surfaces will not be permitted. Defective concrete shall be repaired by cutting out the unsatisfactory material and placing new concrete which shall be formed with keys, dovetails, and anchors to attach it securely to the other work. This concrete shall be drier than the usual mixture and shall be thoroughly tamped into place. All surfaces of concrete, not covered by forms, that are not to be covered by additional concrete or backfill shall have a wood float finish without additional mortar, and shall be true to elevations as shown on contract drawings. Striking-off and finishing shall follow closely the placing operation in order to insure completion before the initial set has taken place. The contractor will not be permitted to start a pour unless a sufficient number of qualified finishers are available to fulfill the above requirements. Care shall be taken to see that all excess water is removed before
35 making the finish. Other surfaces shall be brought to the specified finished elevation and left true and regular as approved by the contracting officer. Where considered necessary

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by the contracting officer, or where indicated on the drawings, joints shall be made carefully with a jointing tool. Every precaution shall be taken by the contractor to protect finished surfaces from stains or abrasions. No fire shall be permitted in direct contact with any concrete at any time. Concrete surfaces or edges likely to be injured during the construction period shall be properly protected by leaving the forms in place or by erecting covers satisfactory to the contracting officer."

27. Section 1, paragraph 1–11, Work Covered by Contract Price, provides as follows:

"1–11. Work Covered by Contract Price.—The contractor shall, under the contract prices, furnish and pay for all materials, equipment, and labor for all permanent, temporary, and incidental work, furnish all accessories, and do everything which is necessary to carry out the contract in good faith, which contemplates everything completed, in proper working order, of good materials with skillful workmanship, accurately fitted, properly assembled, and connected."

28. The placement of concrete began on August 20, 1941, and placement was made from time to time during that construction season until October 24, 1941. During this time monoliths Nos. 1 through 17 were poured. The first concrete which was placed above the foundation and as to which the plaintiff's claim for finishing relates was commenced on September 5, 1941.

29. From the time that the forms were stripped from the exposed concrete lifts above the foundation, the defendant's field representatives complained to Mr. Gabriel, plaintiff's superintendent, of the poor faces on the exposed concrete. After monoliths Nos. 1 through 17 had been poured and the forms stripped from the concrete, there were rust stains showing from the water pipes used in curing, and the concrete faces showed numerous blemishes, pockmarks and honeycombs. Protruding fins had not been removed, and the form tie rods holes had not been filled.

30. Prior to October 29, 1941, defendant complained to plaintiff regarding the tie holes not being plugged as re-
36 quired by paragraph 7–05 (d) of the contract specifications.

31. Under date of July 28, 1941, plaintiff transmitted to defendant some revised prints covering certain form details in the construction of the wall and which made reference to the proposed use of certain porcelain tubes or cylinders for the purpose of putting bolts through said porcelain cylinders which could act as spreaders and thereby increase or lessen the width of the forms.

32. Defendant, by letter dated August 4, 1941, approved plaintiff's revised prints subject to certain provisions which in part provided:

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"(e) The approval as indicated above is predicated on producing a finished concrete surface as contemplated in contract specifications, and the right is reserved to require necessary revisions in your form construction to provide uniform finished surfaces on all exposed faces."

33. On October 15, 1941, defendant objected to the further use by plaintiff of visible porcelain tubes which gave the appearance of an unfinished job.

34. Under date of November 15, 1941, defendant wrote plaintiff regarding the unused porcelain tubes and therein stated that plaintiff would be allowed to use these tubes on unexposed concrete wall surfaces and would be paid for the remaining unused porcelain tubes.

35. The defendant has allowed payment for porcelain tubes which were delivered by plaintiff to defendant but not used on the job.

36. On October 20, 1941, the contracting officer addressed and forwarded the following letter to the plaintiff:

"Reference is made to Par. 7-05 (d), Finishing of Concrete Surfaces, of your Contract No. W-321-eng-261 for the construction of the Elmira Flood Protection Project, Section 1.

"I have examined the concrete work constructed to date under your contract and find that it has not been finished in accordance with the provisions of the contract specifications. You are directed to correct these deficiencies at once. My field representatives will indicate the defective work and furnish details of the required corrective measures."

37 37. By letter dated October 29, 1941, defendant's Resident Engineer forwarded a detailed statement of corrective measures to be taken by the contractor in two parts, the first relating to the treatment of monoliths Nos. 1 through 17 which had then been placed, and the second relating to the treatment of concrete which had not then been placed. The detailed statement of corrective measures provides as follows:

"METHOD OF TREATING EXISTING WORK

"The surface to be treated will be scrubbed with a wire brush where necessary to clean out defective areas.

"Mix one part portland cement with two parts fine sand (similar to that used on the project from which particles retained on the No. 16 sieve has been removed) with water sufficient to produce a grout having the consistency of very thick paint. If necessary, white portland cement shall be added, replacing an equal quantity of standard cement, in a quantity sufficient to give a color equal to the concrete in the project. A test of the procedure and color will be made on a panel which is to be covered

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with backfill. This mixture shall be carefully worked out so that no difference in color will result from the grout. This mixture shall be allowed to set for 45 minutes before being used. The surface of the concrete to be treated shall be thoroughly wet, after which the grout shall be applied with a brush or cloth completely filling air bubbles and holes. Immediately after applying the grout scour the wall vigorously with a cork or wood float. The grout shall then be allowed to set partially for an hour or two, depending on the weather, until it has hardened sufficiently so that it can be scraped from the wall with the edge of a steel trowel without removing the grout from the small air holes. Next allow the surface to dry thoroughly one to two hours or more depending on the weather until the initial set occurs and rub it vigorously with a burlap bag to completely remove any dried grout. There shall be no visible film of grout remaining after this rubbing. The entire cleaning operation for any monolith shall be completed the same day it is started. The entire exposed surface of the monolith shall be treated in this manner. If any dark streaks or spots remain after this operation they shall be rubbed lightly with a fine carborundum stone. This rubbing must be carefully done to avoid changing the texture of the concrete.

38 "After the grout has become thoroughly set (24 hours in warm weather and 48 hours in cold weather) curing will commence and continue for at least seven days. Curing shall be accomplished by covering finished surfaces promptly with damp burlap or cotton quilts. (Heating will not be necessary on old walls.)

"METHOD OF TREATING NEW CONCRETE WORK

"The forms on work that is to be exposed shall be removed as soon as it is possible to do so without injury to the concrete. In warm weather (minimum 65° F., average 75° F.) this will be approximately 24 hours after the completion of placing. In colder weather the forms should be allowed to remain in place approximately 48 hours.

"Immediately after the forms have been removed all fins or other projections shall be broken off with a carborundum stone or other suitable tool which will remove the projections without marring the surrounding surfaces. Filling of form tie holes shall be concurrent with the removal of fins, etc. This operation shall be separate from general finishing and shall be accomplished with retempered mortar. This mortar shall have the same sand-cement ratio as the concrete in the original work. Sufficient water shall be added to make a dry mixture. This mortar shall be thoroughly mixed, allow to set for one hour and then remixed before being used. The material shall be thoroughly tamped

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into the tie holes and care shall be taken not to smear or deface the surrounding surfaces. Other patching of honeycomb or similar defects shall also be accomplished with sand-cement mortar as described above. All patches shall bond with the steel reinforcement and shall, if feasible, be dovetailed to the existing work. Dish shaped patches with sloping sides shall not be permitted.

"Upon completion of repair work as outlined above, the entire exposed surface shall be treated as follows:

"A thin sand-cement mortar shall be applied to the entire surface with a steel trowel. This mortar shall be composed of one part cement and two parts sand to which water shall be added until the mortar has the consistency of very thick paint. If necessary, white cement shall be used replacing an equal quantity of regular cement so that the dry mortar will have the same color as the concrete in the structure. Panels shall be experimented with on concrete surfaces which will be covered in order to assure this similarity in color. This application shall be sufficiently
39 vigorous to insure the complete filling of all pock marks or other blemishes. The sand for this mortar shall be the sand as regulaly [sic] used in the concrete work except that the sizes retained on a No. 16 sieve shall be removed. The mortar applied to the concrete surface shall be allowed to set for one hour and the surplus shall then be removed by scraping the surface lightly with the edge of a steel trowel or steel float. After the lapse of sufficient time to allow initial set or hardening of the mortar, the surface shall be vigorously rubbed with Clean Dry Burlap which shall entirely remove the mortar on the surface of the concrete. Initial curing shall be commenced immediately after this operation and shall consist of covering the finished surface with Clean Wet Burlap. Normal water curing will commence 12 hours later. Finishing of concrete surfaces shall be completed in the minimum possible time and in no case shall the finishing be extended over more than a 12 hour period. (This is specified because the color of the finished surface may vary with atmospheric conditions and make blending with adjacent finished surfaces difficult.)"

38. Upon receipt of the letter and its enclosure referred to in the foregoing finding, the plaintiff on October 31, 1941, addressed the following letter to the contracting officer:

"Receipt is acknowledged of your letter of October 29th relative to certain finishing which you desire us to do on the concrete already placed on this project. It seems wise at this time to review briefly, for the record, the procedure which has previously taken place and which must therefore be responsible for the appearance of these concrete walls. Before reviewing this procedure, let me state that we are already proceeding to do as directed in your

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letter of October 29th, and that we will at all times proceed with any of your instructions, our desire, however being, of course, that we be protected insofar as the matter of reimbursement to us, for any expenses plus normal profit incurred in carrying out any such instructions, is concerned.

"The aggregates used in the Elmira work, gravel, sand, and cement, were all previously approved by your representatives and accepted for this work. The water is the same as that used by the people of Elmira for drinking water and has also been approved by your representatives. The characteristics of the mixture, insofar as the porportion [sic] of the component parts, was set by your representatives after exhaustive tests on their part. The form lining used was approved by your representatives and the forms themselves compare in construction very favorably as to strength, appearance, etc., with any used in the district, and this we have on the authority of the Acting Chief of Operations. We come, therefore, to the mixing and placing of the concrete, and at all times these procedures have been directly and completely under the control of your representatives. No latitude has been allowed us for the carrying out of any opposing ideas we may have had in this work, ideas which may or may not have secured a better result, but in any event we were not allowed to try them out. We must, therefore, in view of all the above, respectfully suggest that the responsibility for any result which may not appeal to you, does not lie on our shoulders.

"It is our understanding that costs are being kept by your representatives as well as by ourselves on the additional expense that is now accruing because of the finishing operations which you have directed, and that on the conclusion of these operations a satisfactory settlement will be reached to reimburse us for this expense. If this understanding is not in accordance with yours, we should appreciate being advised at once.

"Your consideration and advice on all the above will be appreciated."

39. After monoliths Nos. 1 through 17 were treated in accordance with the procedure outlined for existing work, the plaintiff submitted on November 27, 1941, a request for the payment of the sum of $864.07 covering the cost of such work. This sum resulted after an allowance of $111.75 had been deducted as the cost of filling form tie rod holes.

On December 10, 1941, the contracting officer by letter acknowledged receipt of the above letter and stated as follows:

"I find that the finishing treatment required on your job is well within the intent of paragraph 7–05 (d), and I cannot consider additional payment for this work."

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Following receipt of the above letter, Mr. Fred Davis, vice president of plaintiff, conferred with the District Engineer on December 15, 1941. After this conference, the plaintiff addressed the following letter to the contracting officer:

"As a result of a conference held this morning with the District Engineer, Mr. Samples, and myself, my understanding of the conclusions reached at this conference is outlined below.

"1. I understand that our company is not giving up any of
41 our rights to future consideration of our claim for the cost of the treatment of the walls constructed during 1941 by reason of not appealing at this time the decision of the District Engineer outlined in his letter of December 10th.

"2. That consideration will be given to payment by the United States for any increase in our costs because of any change in the kind of aggregates composing the concrete mixtures or because of any change that may be prescribed in handling the concrete.

"3. That the treatment of the walls in the future will be modified, in that treatment will be required only on the land side of the walls except that at bridge approaches where treatment shall be on both sides of the walls for a distance of three or four monoliths from the bridge approach; such treatment shall immediately follow the removal of the forms and shall consist of rubbing the concrete with carborundun [sic] stone and brushing with a light coat of mortar if required. It will also, of course, be necessary for us to block the holes at the form tie rods.

"We would appreciate knowing as to whether your understanding is in general accordance with the above."

40. The contracting officer replied by letter of December 29, 1941, as follows:

"Reference is made to your letter dated December 15, 1941, regarding your understanding of conclusions reached at a conference in my office on December 15, 1941, on concrete construction at the Elmira Flood Protection Project, Section No. 1, Contract No. W-321-eng-261.

"Using the same numerical index as used in your letter you are advised that conclusions reached in the conference were as follows:

"1. Your right of appeal from my decision on payment for wall treatment is established in Article 15 of the contract.

"2. Any redesign of concrete mixtures or required changes in methods of handling concrete not within the scope of specifications which causes increased cost will be cause for consideration of increased payments to you.

"3. Treatment of walls will be required on the landside of all walls and on the streamside of walls approximately 100 feet upstream and downstream of all bridges, approaches, or other similar places where relatively close scrutiny is easily attained. In

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addition to the above treatment regular patching of tie rod holes, replacing unsatisfactory spots, repair of honeycombs, etc.,
42 will be required on all surfaces in accordance with specification requirements."

41. On February 9, 1943, the plaintiff filed a protest with the contracting officer listing five items of claim but not including the claim for concrete finishing. This was replied to by letter of February 18, 1943, by the contracting officer, in which the following statement is made:

"In view of the fact that your letter and this reply are repetitions of previous protests and decisions, and that no progress is apparent in the settlement of this dispute, it is suggested that, in event you elect to prosecute this matter further, you arrange to present detailed facts, computations, etc., either by letter or at a conference in this office."

On February 24, 1943, the plaintiff forwarded an executed copy of a release dated February 19, 1943, a copy of which is in evidence as plaintiff's exhibit 7 and made a part hereof by reference. In this release, the plaintiff excepted a claim by reason of concrete finishing operations

"* * * in a manner and to an extent not required by the contract plans and specifications. * * *"

The plaintiff suggested in the letter transmitting the release that $100 be withheld from payment due it on its final estimate. In this letter the plaintiff also discussed the concrete finishing claim and protested the sums allowed for the concrete items in the final estimate and requested an opportunity to submit detailed data as to the cost of performing this "additional" work.

42. The contracting officer on March 5, 1943, sent the following letter to plaintiff:

"Receipt is acknowledged of your letter dated February 24, 1943, transmitting executed copies of standard release form for Contract No. W-321-eng-261, and an application for reconsideration of a previous appeal, addressed to the Chief of Engineers, relative to minimum wage rate.

"Reference is made to the exceptions listed in your formal release to Contract No. W-321-eng-261, and you are advised, as follows, as to the action taken by this office relative to the various claims.

"(a) The decision relative to additional payment for
43 work in connection with treatment of concrete surfaces, was given in letter from this office dated December 10, 1941. Reference is made to letter from this office dated December 29, 1941, informing you of your right to appeal the decision of this office as established in Article 15 of the contract. As no appeal

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was made as per Article 15 of the contract, it is considered that your right to appeal has been forfeited.

"(b) A decision relative to the other exceptions to the release; namely, payment of Sheeting (Including Shoring) Contract Item No. 7; payment of Copper, Contract Item No. 28, and payment of Contract Item No. 6, Removal—Walls, Slabs, Paving, Building Foundations (Concrete or Masonry) was given in letter from this office dated February 18, 1943.

"Your right of appeal from my decision on payment of the items covered in paragraph (b) above is established in Article 15 of the contract. The time allowed for appeal will expire thirty days from date of this letter.

"You are further advised that a voucher is being prepared for your signature for the partial estimate now due, less $100.00, as requested in your letter of February 19, 1943."

43. The plaintiff on March 19, 1943, appealed the decision of the contracting officer of February 18, 1943, and claimed in addition to the sheeting and shoring item and other items not here material, a concrete finishing item of $7,082.74 of which $862.42 was claimed for the finishing of monoliths Nos. 1 through 17 as to which the detailed statement of corrective measures related to the Method of Treating Existing Work, and $6,220.32 was claimed for the finishing of all other work as to which finishing was performed pursuant to the Method of Treating New Concrete Work contained in such detailed statement.

The contracting officer on June 2, 1943, forwarded his findings of fact on the plaintiff's claim to the Chief of Engineers. So far as here material, this finding of fact provides as follows:

"4. With reference to finishing concrete surfaces (paragraph 3a above), the contractor was required, in accordance with the contract specifications, to finish exposed concrete wall surfaces. The contractor offered verbal and written protests all of which were duly considered prior to the District Engineer's decision dated December 10, 1941 (Exhibit F), which denied the contractor's request for additional payment. After a conference in
44 the District Engineer's office on December 15, 1941, the contractor forwarded the letter of the same date which he quotes on page 8 of his appeal. The District Engineer in turn with letter dated December 29, 1941 (Exhibit G), replied to the contractor's letter of December 10, 1941, and denied his request for additional compensation. The contractor was advised of his further rights of appeal under Article 15 of the contract. Records of this office do not disclose any further correspondence on this item of complaint prior to receipt of the final release (Exhibit Q), which was returned with letter dated February 24, 1943 (Exhibit D)."

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On April 29, 1944, the contracting officer forwarded a supplement to his findings of fact dated June 2, 1943, to the Chief of Engineers. It provided as follows:

"1. The following facts concern that portion of the contractor's appeal pertaining to the finishing of concrete surfaces and is supplementary to the facts presented in paragraph four of Findings of Fact, dated 2 June 1943.

"2. Operations under the subject contract were commenced on 3 June 1941. Placement of concrete commenced on 19 August 1941 and a total of 955 cubic yards of Class A concrete, Item 20, was placed through 24 October 1941, the date concrete operations were suspended for the winter season. During the first season the contractor after the removal of forms did not attempt to patch holes or remove surface irregularities from the exposed concrete surfaces as required by paragaph 7–05d of the contact specifications. The District Engineer on 15 October 1941 inspected the site of the work and verbally directed that immediate action be taken to remedy the unsightly condition presented by the unfinished concrete surfaces. The contractor was formally directed by letter dated 20 October 1941 (attached as Inclosure No. 1) to correct the surface deficiencies in a manner to be indicated by the resident engineer. The resident engineer by letter dated 29 October 1941 (see page 10 of contractor's appeal) furnished the contractor a complete set of instructions for the guidance of the contractor. Two procedures were outlined; the first pertained to finishing concrete placed and cured under the contract prior to the issuance of said instructions, the second procedure outlined a more timely method of finishing to be applied on subsequent work. The contractor complied with the instructions as outlined and by letter dated 27 November 1941 (attached as Inclosure No. 2) pre-
45 sented a bill in the amount of $864.07 for finishing 5,330 sq. ft. of concrete surface. The District Engineer by letter dated 10 December 1941 (Exhibit F of Findings of Fact) denied the contractor's request for additional payment on the grounds that the work performed was within the intent of the specification. The subsequent history is as outlined in paragraph 4 of the original Findings of Fact dated 2 June 1943."

44. Thereafter on June 19, 1944, the plaintiff filed with the Chief of Engineers a memorandum in further support of its appeal.

45. The Acting Chief of Engineers by letter of July 31, 1944, forwarded to plaintiff his decision denying the plaintiff's appeal which provided in pertinent part as follows:

"You claim additional compensation in the amount of $7,082.74 for finishing concrete in a manner allegedly not required by the contract specifications. It is not now contended by you that an

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appeal was taken within thirty days from the date of the contracting officer's decision denying your claim in the amount of $862.42 for finishing concrete erected in 1941 as required by paragraph 1–20 of the contract specifications. Thus further consideration of this item is precluded. In regard to the item of $6,220.32 for finishing concrete erected in 1942, the only question involved is whether instructions issued by the Contracting Officer for said work exceed the requirements of the contract. An examination of the applicable provisions of the specifications and the instructions issued by the contracting officer clearly show that the claim for this item was properly denied. Paragraph 7–05 (d) of the specifications requires you to finish the concrete surfaces, '* * * as directed by the contracting officer * * *' without any compensation in addition to that provided in the contract unit prices for concrete. This provision does not obligate you to comply with arbitrary instructions issued by the contracting officer. It does require you, however, to comply with any reasonable instructions of the contracting officer and to finish the concrete in a sightly and workmanlike manner. The instructions issued by the contracting officer for finishing 'new concrete work' are reasonable and represent the minimum requirements for a workmanlike job. Your appeal for additional compensation for finishing concrete is therefor denied."

A reconsideration of the appeal was thereafter requested on behalf of the plaintiff and on October 1, 1946, the Chief
46 of Engineers reaffirmed the action by the Acting Chief of Engineers of July 31, 1944, referred to above.

46. The plaintiff appealed the decision of the Chief of Engineers to the War Department Board of Contract Appeals. The president of this Board on January 10, 1947, as the Authorized Representative of the Secretary of War, dismissed the appeals following the decision of the Board which found that it had no jurisdiction to entertain them.

47. On monoliths Nos. 1 through 17, 5,330 square feet of concrete surface was treated in accordance with the direction of the contracting officer. The plaintiff by its letter of November 27, 1941, claimed a total of $864.07 for such surface treatment, itemized as follows:

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Labor

Oct. 27/41 to and incl. Nov. 18/41

124 hours @ $1.50 per hour	$186.00
127 hours @ $1.25 per hour	158.75
522.5 hours @ $0.75 per hour	391.87
20 hours @ $1.87 per hour	37.40
5 hours @ $2.25 per hour	11.25
6 hours @ $0.80 per hour	4.80
4 hours @ $1.125 per hour	4.50
Total labor	794.57
Less clean and plug form tie rod holes, 149 hrs, @ $0.75 per hour	—111.75
Balance due a/c labor	682.82
Rent of scaffold (swinging)	18.00
Material of built scaffold	15.00
2 carborundum stones	2.50
2 trowels	1.70
3 wire brushed [sic]	1.80
2 plaster brushes	2.10
2 bags cement	1.19
1 bag cement (white)	2.50
0.2 ton sand	0.40
Compension [sic] and other insurances @ $8.423 per hundred dollars of pay roll	57.51
Total labor, material and accessories	785.52
10% on the above to allow for overheads and profit	78.55
Total	864.07

47 No proof of damages relating to the claim was made other than the claim itself.

48. The plaintiff claims as the extra cost to it of the concrete finishing during 1942, in accordance with the directions of the contracting officer relating to new work, the sum of $6,070.19 itemized as follows:

Labor	$5,934.64
Material	100.00
Small tools	50.00
Compensation, P. L. & P. D., $7.24 per H. of P. R	429.67
State unemployment, 2.7%	160.24
Social Security, 1%	59.35
Total	6,733.90
Profit, 10%	673.39
Total	7,407.29
Chargeable to work as called for in the specifications, 27,944 S. F. @ $.05 per S. F., incl. all insurances, bonds, profit, etc.	1,397.20
Balance	6,010.09
Bond	60.10
Total Claimed, 1942	6,070.19

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It is noted that in the computation above a credit of five cents per foot is allowed by plaintiff as the cost which it feels is properly chargeable to it for the finishing according to the contract specifications.

Excepting such credit shown, the entire claim is based upon labor cost and other costs in turn based upon the cost of labor with the further exception of $150 for material and labor. Since as the secretary of the plaintiff testified, certain original pay roll records have been lost due to some cause beyond his knowledge, it is not possible to verify the extra cost of concrete finishing in 1942 relating to new work.

Respectfully submitted.

WILLIAM E. DAY,
Commissioner.

49 *Proceedings following filing of Commissioner's report*

On August 24, 1951, plaintiff filed a motion for leave to amend the petition.

On September 4, 1951, the court entered the following order on said motion:

"Motion to amend petition allowed insofar as it modifies or increases the amounts claimed, and overruled otherwise."

On December 5, 1951, plaintiff filed its first amended petition, which is as follows:

51 In the Court of Claims of the United States

[Title omitted.]

First amended petition

Filed December 5, 1951

To the Court of Claims of the United States:

The amended petition of the plaintiff respectfully represents that:

I

1. The plaintiff is, and at all times hereinafter referred to was, a corporation organized and existing under the laws of the State of New York, with its principal place of business in Binghamton, New York.

2. The plaintiff has, at all times, borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government.

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52 3. On or about March 29, 1941, the United States Army Engineer Office at Binghamton, New York, invited bids for the construction of Flood Protection Project (Section No. 1) along the right bank of the Chemung River within the limits of the City of Elmira, Chemung County, New York. The plaintiff, in response to such invitation, submitted a bid in the fixed amount of $232,669.30 which, on April 29, 1941, was accepted. Pursuant to such bid and acceptance, there was subsequently executed Contract No. W-321-eng-261, dated May 14, 1941 (hereinafter referred to as the "contract"), a copy of the material portions of which is annexed hereto. Such contract was an authorized and binding obligation of the defendant.

II

4. Under the provisions of the Act of August 30, 1935, 49 Stat. 1011—the so-called Davis-Bacon Act—the contract was required to, and did, contain a provision obligating the plaintiff to pay not less than the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the territorial area in which such work was to be performed. In the Specifications for the work covered by the contract, which Specifications, dated March 29, 1941, were issued as of the date thereof in connection with the advertisement for bids as the basis upon which such bids were to be made, and which were appended to and made a part of the definitive contract, the representation was made that the Secretary of Labor had determined the prevailing wage rates in the locality; and such rates were set forth in Paragraph 1-31 of the Specifications. Among the rates so given were the following:

53

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.00
* * * * *	
Laborers, unskilled	.50
Laborers, concrete puddlers	.50
* * * * *	

5. The plaintiff, acting on the basis of the wage rates stated in the Specifications, as it was invited and entitled to do, computed and submitted its bid. Subsequent to the acceptance of such bid and after the execution of the definitive contract, the plaintiff discovered that the wage rates for the classifications of labor referred to above in Paragraph 4 were not in fact the prevailing rates for such labor as determined by the Secretary of Labor, neither as of the time of the issuance of the Specifications, the

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acceptance of the bid, nor the execution of the contract; and that the Secretary of Labor in at least one instance, namely, on March 4, 1941, had determined the prevailing wage rates in the locality for these classifications of labor on a similar project to be higher than those stated in the Specifications of March 29, 1941, as follows:

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.125
* * * * *	
Laborers, unskilled	.55
Laborers, concrete puddlers	.55
* * * * *	

Such determination of the Secretary of Labor was still in effect and unmodified on March 29, 1941, and the Specifications issued by the defendant on such latter date were defective and misleading in failing to reflect such determination.

54 6. Upon commencing work under the contract, the plaintiff was unable to procure labor of these classifications at the rates stated in the Specifications, and was in fact obliged to pay higher rates, as follows:

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.125
* * * * *	
Laborers, unskilled	.625
Laborers, concrete puddlers	.625
* * * * *	

7. The plaintiff was entitled to, and did, rely upon the wage rates stated in the Specifications as being in accordance with the most recent determinations by the Secretary of Labor of the wage rates prevailing for the corresponding classes of workmen on similar projects in the area; and was entitled to, and did, prepare and submit its bid on this assumption. When, after the acceptance of its bid and the execution of the contract, it discovered the error in the representations made to it, it was entitled to be reimbursed at the higher rates which it was required to pay in order to perform the contract work, to the extent that such higher rates were equivalent to the prevailing rates fixed by the Secretary of Labor in her determination of March 4, 1941. The plaintiff duly requested such reimbursement by appropriate adjustment in the contract price, but the defendant wrongfully denied such request.

8. The failure of the defendant so to adjust the contract price has resulted in injury and damage to the plaintiff in the amount of $9,525.44, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

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III

9. The 62½¢ hourly wage rate with respect to laborers (both unskilled and concrete puddlers) which the plaintiff was obliged in fact to pay in order to procure labor to perform the contract work was, in fact, the prevailing hourly rate in the locality at the time of the issuance of the Specifications, the acceptance of the bid, and the execution of the contract; and the 55¢ rate fixed in the Secretary of Labor's determination of March 4, 1941, was less than the actual prevailing rate at such times. The failure of the defendant to make an accurate representation in the Specifications to the plaintiff with respect to the hourly rate actually prevailing at the time of the issuance of the Specifications, was a breach of the defendant's obligation to state such prevailing rates correctly and not to mislead the plaintiff by representing that the prevailing rates were lower than they were in fact. Because of the fact that the plaintiff was obliged to pay the 62½¢ prevailing rate in order to procure labor to perform the contract work, the plaintiff was entitled, in addition to the claim hereinabove described under Section II, to be further reimbursed for the difference between the 55¢ rate for laborers fixed in the Secretary of Labor's determination of March 4, 1941, and the 62½¢ hourly rate actually prevailing at the time of the issuance of the Specification, the acceptance of the plaintiff's bid, and the execution of the contract, which 62½¢ rate the plaintiff was required to, and did, pay. Plaintiff duly requested such reimbursement but the defendant wrongfully denied such request.

10. The failure of the defendant to make such reimbursement has resulted in injury and damage to the plaintiff in the amount of $6,071.94, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

56

IV

11. Paragraph 7–05 (d) of the Specifications contained a detailed description of the manner in which, and the materials with which, the concrete involved in the construction was to be finished. In submitting its bid, the plaintiff was entitled to, and did, rely upon the statements made in said Paragraph 7–05 (d) in computing the cost to it of finishing such concrete. During the performance of the contract, the defendant ordered and required the plaintiff to finish the concrete in a manner and with materials not specified in, or reasonably contemplated by, the Specifications, with the result that plaintiff was subjected to unauthorized and unanticipated costs, reimbursement of which was duly requested by the plaintiff but wrongfully denied by the defendant.

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12. The defendant's wrongful conduct in this respect has resulted in injury and damage to the plaintiff in the amount of $6,934.26, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

V

13. Under the provisions of paragraph 3–06 of the Specifications, the plaintiff was required to furnish certain sheeting and shoring. Subparagraph (c) of said Paragraph 3–06 provided that such sheeting and shoring was to be measured "by the square foot of protected area", and subparagraph (d) of said Paragraph 3–06 provided that payment for sheeting and shoring would be made at the contract unit price of Sixty-five Cents ($0.65) per square foot, as stated in the Schedule of Payments annexed to and made a part of the contract.

57 14. In computing its bid, the plaintiff was entitled to, and did, rely upon the statements contained in Paragraph 3–06 as to the measurement of sheeting and shoring by the square foot of protected area, and computed its bid on the basis of square footage of the area required to be protected. During the performance of the contract, however, the defendant refused to pay the plaintiff for sheeting and shoring in accordance with the square footage of the protected area, and, instead, followed an arbitrary and unauthorized method of measurement, not in accordance with the Specifications, which resulted in the underpayment of the plaintiff for sheeting and shoring. Although the plaintiff duly requested payment of the proper amount as contemplated by the contract, such request was wrongfully refused by the defendant.

15. The wrongful conduct of the plaintiff in this respect resulted in injury and damage to the plaintiff in the amount of $14,785.55, payment of which the plaintiff has duly demanded but which the defendant has wrongfully refused.

VI

16. Although the plaintiff duly and formally protested to the Contracting Officer the wrongful actions complained of above, the Contracting Officer refused to afford the plaintiff any relief, and, upon appeal to the Chief of Engineers, was upheld by the latter. Appeals by the plaintiff to the War Department Board of Contract Appeals were, on January 14, 1947, dismissed for an asserted lack of jurisdiction. Except as hereinbefore referred to in this Paragraph 16, no action on the claims has been taken by Congress or by any department of the government.

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58 17. The plaintiff is justly entitled to recover from the defendant the aggregate sum of $37,317.19, after allowing all just credits and offsets.

18. The plaintiff has made no assignment or transfer of the claims or any part thereof, and no persons other than the plaintiff are owners of the claims or of any interest therein.

Wherefore, it is respectfully prayed that judgment be granted against the defendant and in favor of the plaintiff for the sum of $37,317.19, together with such costs as may be properly allowable to it in respect of this suit.

JEROME BEAUDRIAS,
Attorney for Plaintiff, Office and Post Office Address, 83–85 Warburton Avenue, Yonkers 2, New York.

59 [*Duly sworn to by Jerome Beaudrias; jurat omitted in printing.*]

60 [Contract omitted. Printed side page 10 ante.]

64 [Specifications omitted. Printed side page 14 ante.]

71 *Argument and submission of case*

On April 8, 1952, the case was argued and submitted on merits by Mr. Jerome Beaudrias for plaintiff, and by Mr. James J. Sweeney for defendant.

73 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J.*

Filed October 7, 1952

Mr. Jerome Beaudrias for the plaintiff.

Mr. James J. Sweeney, with whom was Mr. Assistant Attorney General Holmes Baldridge, for the defendant.

The Court, upon the evidence, the report of Commissioner William E. Day, and the briefs and argument of counsel, makes the following

Special findings of fact

1. Plaintiff is, and at all times material herein has been, a corporation organized and existing under the laws of the State of New York with its principal office and place of business at Binghamton, New York. Since its formation in 1929, it has been engaged in business as a general contractor.

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2. On March 29, 1941, defendant, acting by and through the War Department's Corps of Engineers' Office at Binghamton, New York, invited bids for the construction of Flood Protection Project (Section No. 1) along the north bank of the Chemung River, within the limits of the city of Elmira, Chemung County, New York. In response to said invitation, plaintiff submitted a bid based upon a unit price applied to the various operations involved in the performance of the work in the total sum of $232,669.30. This bid was accepted by defendant on May 14, 1941. On that date plaintiff and defendant entered into a written contract, No W–321–eng–261, which was approved June 3,
74 1941. On June 5, 1941, defendant gave plaintiff a formal notice to proceed with the work. Actual work commenced on the site of the job on June 3, 1941.

3. The contract was performed by plaintiff, and it has been paid the contract price, as adjusted, for change orders with the exception of $100 which plaintiff instructed the District Engineer to withhold, and plaintiff has refused to accept said $100 from defendant on advice of its counsel.

4. Plaintiff sues for the sum of $37,317.19, the total of three separate claims, as follows:

Claim for reimbursement of wage rates paid to carpenters laborers, and concrete puddlers	$15,597.38
Claim as regards measuring of sheeting and shoring	14,785.55
Claim for finishing of concrete	6,934.26
Total	37,317.19

Each claim will be discussed separately.

WAGE RATES

5. Before bidding, plaintiff was furnished a copy of the specifications. Section 1–31 of such specifications reads, insofar as here pertinent, as follows:

"1–31. Wage and Labor Provisions.—(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.00
* * * * *	
Laborers unskilled	0.50
Laborers, concrete puddlers	0.50
* * * * *	

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6. Article 17 of the contract reads as follows:

"ARTICLE 17. Rate of wages (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).

75 "(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

"(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby."

7. On October 22, 1940, the Elmira business agent of the United Brotherhood of Carpenters and Joiners of America, Local 532, wrote to the United States Engineer's Office in Binghamton, New York, to inform it that the wage scale for carpenters would be increased as of January 1, 1941, from $1 per hour to $1.125 per hour. On October 29, 1940, the District Engineer acknowledged receipt of this letter.

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8. On January 31, 1941, the Secretary of Labor furnished to the Corps of Engineers at its request, for inclusion in the contract specifications, the schedule of minimum wages in the Elmira area.

Such schedule, which is set out in finding 5, was included
76 in the specifications which were furnished to plaintiff prior to the computation of its bid. As stated in finding 2, invitations for bids were issued on March 29, 1941, and plaintiff's bid was accepted on May 14, 1941.

9. On March 4, 1941, the Secretary of Labor furnished to the Public Buildings Administration of the Federal Works Agency a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira, New York. The prevailing wage rates shown therein, in pertinent part, were as follows:

Classification	*Hourly rate*
Carpenters, journeymen	$1.125
Laborers, unskilled	.55

10. Plaintiff employed only union labor on this project. At the time plaintiff began work on the site on June 3, 1941, it had to pay $0.625 per hour for laborers and $1.125 per hour for carpenters. The carpenter wage rate had been put into effect by the union on January 1, 1941, and the laborer wage rate on April 1, 1941.

11. On June 16, 1941, plaintiff advised the District Engineer (who was the contracting officer) that the minimum wage rates provided in the contract specifications were less than the rates currently prevailing in the Elmira locality for carpenters, laborers (unskilled), laborers (concrete puddlers), and truck drivers.

12. The District Engineer replied on June 27, 1941, stating that the minimum wage rates were determined in strict accordance with the applicable law and regulations, and that he could not afford relief for any differences between wage rates then prevailing in the area and the minimum rates required by the contract specifications.

13. Plaintiff protested this decision to the Chief of Engineers under date of July 10, 1941, and on August 5, 1941, plaintiff's appeal was denied by the Chief of Engineers in part as follows:

"There is no authority in law for this office to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions of the above cited act [49 Stat. 1011]. Therefore, I find that the wage rates as established by the Secretary of Labor, and incorporated in the contract specifica-
77 tions were the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work."

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14. Plaintiff under date of February 20, 1943, asked defendant to reconsider its appeal regarding minimum wage rates, and this was responded to by letter dated April 13, 1943, from the Chief of Engineers, in part as follows:

"A determination as to the accuracy of the specified wages is not necessary to a decision in this case. The contract by Article 17 and by paragraph 1–31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract. No reason has been shown which would warrant modification of the previous decision dated August 5, 1941."

15. Paragraph 1–12 of the Standard Government Form of Invitation for Bids, a copy of which was furnished to plaintiff, provides as follows:

"Investigation of Conditions.—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, availability of labor, uncertainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site. At the bidder's request, a representative of the Government will point out the site of the proposed operations. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work."

16. If plaintiff's president had investigated wage rates, he could have ascertained that the prevailing wage for carpenters was $1.125 per hour, and that the prevailing rate for unskilled labor was $.55 per hour, with an advance to $.625 per hour, effective as of April 1, 1941. Also, before inviting bids on this project, the District Engineer could have ascertained that the Sec-
78 retary of Labor had made a new determination of the prevailing wage rates for Elmira on March 4, 1941.

17. Because plaintiff was required to pay $1.125 per hour to carpenters instead of $1 per hour, as shown in the bid proposal and contract wage schedule, its labor costs were increased $3,786.68. Similarly, plaintiff's labor costs for unskilled laborers and concrete puddlers were increased $3,576.54 as the result of the payment of the $0.55 per hour rate instead of the $0.50 per hour rate

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specified in the contract wage schedule. The total of these amounts, which includes plaintiff's increased payroll insurance and taxes, is $7,363.22.

SHEETING AND SHORING

18. The contract specifications provide in part as follows:

SECTION I

"1-14. Work Areas.—* * *

"(b) The contractor shall be responsible for trespassing upon, or damage to, public and private lands and roads, bridges, buildings, chimneys, and utilities in or adjacent to the work and access areas resulting from any act or omission on his part, including damage caused by disturbance of foundations while conducting any operation within the work area. The contractor shall take special precautions to prevent injury to existing structures while working in the vicinity of the Hygeia plant, Brand building, greenhouse, gas regulation house, private dwellings, and all other buildings and structures located at or close to the edge of the work area. He shall take similar precautions in the vicinity of the pole line crossing the levee at West Hudson Street, the water main at approximate State 176+37, all power facilities at the Hygeia plant, and any other utilities which will not be relocated.

* * * * *

"(d) The garage and other property of the Hygeia Refrigerating Company are within the work area, and the activities of this company will be carried on during construction of the project. The contractor shall cooperate with this company during all construction operations in order to preserve its access and permit its operations to be conducted with a minimum of interfer-
79 ence by the contractor. The contractor shall perform the necessary construction on the company's property in the least practicable time. He shall provide bracing or other protection satisfactory to the contracting officer for the garage wall against which the new wall is placed. The garage and other property within the work area shall be restored to a condition satisfactory to the contracting officer upon completion of the permanent work in that area.

* * * * *

"SECTION III

"3.03. Excavation—Common. * * *

"(b) Procedure. (1) General. Excavation—Common shall be performed in accordance with subparagraph 3-01 (c). Excavation around bridge piers and abutments, existing walls, build-

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ings, chimneys, transformers, power lines, utilities, sewers, culverts, and other existing structures shall be executed with all due precautions, satisfactory to the contracting officer, for safeguarding the structures. (See paragraph 1–14.) Where special work is required to prevent undermining existing structures, it shall be done in accordance with detailed plans prepared by the contractor and approved by the contracting officer, but such approval shall not relieve the contractor of responsibility for damages which may result from the failure of the temporary protection. Where excavation operations endanger the stability of existing or new structures, sheeting and shoring shall be installed at the locations indicated on the drawings or directed by the contracting officer. The contractor shall be responsible for the safety of such structures. (See subparagraph (3) below and paragraph 3–06.) * * *

* * * * *

"(3) Sewers, Culverts, and Drains.—The contractor shall furnish and install sheeting and shoring in all trenches where the depth exceeds 6 feet. * * *

* * * * *

"3–06. Sheeting and Shoring.—(a) General.—The contractor shall furnish and place such sheeting, shoring, bracing, or other approved supports as are indicated on the contract drawings or directed by the contracting officer for the protection of the work or adjoining property. The right is reserved to order the installation of sheeting and shoring where its use is considered
80 advisable for the safety of the work, and to require such sheeting and shoring to remain in place when its removal is considered inadvisable.

"(b) Procedure.—All sheeting and shoring shall be designed by the contractor and approved by the contracting officer prior to installation, but such approval by the contracting officer shall not relieve the contractor of sole responsibility for damages resulting from the inadequacy or lack of any sheeting and shoring. The sheeting and shoring shall be built to provide adequate clearances for minimum interference with construction operations, proper bracing for stability, and safe conditions around the work. If, in the opinion of the contracting officer, any methods or measures of the contractor constitute a hazard in any way or are otherwise improper or inadequate, the contracting officer will notify the contractor of that fact in writing. If the contractor fails to provide immediately such remedial measures as are deemed necessary by the contracting officer, such measures will be provided by the contracting officer at the expense of the contractor. When sheeting and shoring have served their purpose and their removal is

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approved by the contracting officer, they shall be removed and disposed of. Whether sheeting and shoring are removed or left in place, all cavities shall be adequately filled. When approved by the contracting officer, sheeting and shoring may be used in lieu of excavation to full pay lines.

"(c) Measurement.—Sheeting and shoring will be measured by the square foot of protected area.

"(d) Payment.—Except as specified below, payment for all costs of furnishing and placing sheeting and shoring indicated on the contract drawings or directed by the contracting officer, and of its removal and disposal when not left in place, will be made at the contract unit price for "Sheeting (Including Shoring)," Item No. 7. Where sheeting and shoring are used at the contractor's option and with the approval of the contracting officer, separate payment will not be made for the sheeting and shoring, but payment will be made for excavation to the pay lines shown on the contract drawings as though the cut had been made to such pay lines."

19. The schedule of payments incorporated into the contract in suit provided in item 7 that the plaintiff was to be paid for sheeting (including shoring) on a quantity of 9,200 square feet at the rate of 65 cents per square foot, or a total of $5,980.

81 20. Section I, paragraph 1–05, provides in pertinent part as follows:

"1–05. Quantities.—The following estimate of quantities is given only to serve as a basis for comparison of bids and for determining the amount of consideration of the contract;. Within the limits of available funds, the contractor will be required to perform the entire quantity of work necessary to complete the work specified in paragraph 1–02 hereof, be it more or less than the amounts herein estimated.

* * * * *

"Item No. 7 Sheeting (Including Shoring) 9,200 Sq. Ft."

* * * * *

21. As the work progressed, the plaintiff placed sheeting and shoring necessary for the protection of the work as well as that necessary for the protection of existing buildings and structures. Payment was made on account of such sheeting and shoring, as well as the other work performed by the plaintiff, on monthly estimates prepared by defendant's resident engineer and given to plaintiff's superintendent together with a payment voucher for execution on behalf of plaintiff. The plaintiff executed such payment vouchers and forwarded them along with each monthly estimate for payment by the defendant's paying office. On the second such monthly estimate forwarded with a payment voucher by plaintiff, an item of 438 square feet of sheeting, including shoring,

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appears under item 7. On subsequent monthly estimates supporting payment vouchers, under item 7 appears a figure covering additional sheeting, including shoring. The plaintiff accepted monthly payments on such payment vouchers without question as to the manner of computation of the sheeting (including shoring) item until the final estimate was received by the plaintiff showing a total of 10,152 square feet.

22. After all of the work under the contract had been performed, the defendant, through the resident inspector, forwarded proposed final estimate on January 21, 1943. On January 28, 1943, plaintiff's superintendent, Mr. Bernard Gabriel, went to the office of the District Engineer at Syracuse, New York, and conferred with a representative of that official concerning claims for additional payments on various contract items including sheeting and shoring. Following this conference, the plaintiff
82 received a letter dated February 1, 1943, from the District Engineer in which it is stated that:

"In computing pay quantities the following methods were used by this office.

"Sheeting—Computations based on field measurements of length and height of sheeting placed."

23. The plaintiff was paid at the rate of 65 cents per square foot for 10,152.1 square feet of sheeting and shoring. Of this amount 6,738.2 square feet was for the protection of the work, and 3,413.9 square feet was for the protection of property. The plaintiff claims that it should have been paid for 32,899 square feet, 8,094 square feet for the protection of the work, and 24,805 square feet for the proptection of property.

As to the sheeting and shoring required for the protection of the work, it is plaintiff's position that the protected area was the area of side walls of trenches excavated where sheeting was placed.

On many items concerning sheeting placed for protection of the work, the allowance was as great or greater than that claimed, except for 50 square feet of sheeting claimed at the Walnut Street Bridge, which the defendant allowed under sheeting placed for the protection of property. The evidence is not satisfactory as to the measurements by which either the amount claimed or allowed was computed.

As to the sheeting and shoring required for the protection of the property, plaintiff's claim is based not upon the amount of sheeting or shoring placed, but rather upon the ground area covered by the buildings and structures so protected. The ground area of the buildings and structures which was protected by sheeting and shoring is shown below:

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Ground area of buildings and structures as to which sheeting and shoring was provided

		Square feet
Brand Building	175 x 68	11,900
Hygeia Wall	315 x 6	1,890
Garage (Main St.)	54 x 60	3,240
House (Connolly Ave.)	35 x 25	875
Florist Shop (Walnut St.)	30 x 30	900
Greenhouse (Walnut St.)	240 x 25	6,000
Total		24,805

83 24. The plaintiff on February 9, 1943, wrote to the District Engineer requesting that the defendant recompute the allowance for sheeting and shoring.

"* * * by ascertaining the square footage of the area protected by the work performed under this item, pursuant to paragraph 3–06 subdivision (c) and that we be paid therefor at the unit price of said item. * * *"

The defendant reviewed plaintiff's protests and on February 18, 1943, wrote plaintiff that the item had been measured and computed in strict accordance with the provisions of the contract specifications, and the contractor was invited to present additional facts or computations for consideration.

25. The plaintiff failed to accept this invitation but rather by letter dated February 24, 1943, returned a final release of claims wherein was listed an exception to the method of computing the final quantity of sheeting and shoring.

26. Receipt of the release was acknowledged by letter dated March 5, 1943, and the plaintiff was advised of his further rights of appeal under Article 15 of the contract.

27. On March 19, 1943, plaintiff appealed the decisions of the contracting officer to the Secretary of War, and on July 31, 1944, the appeal was denied. This denial reads in part as follows:

"You allege that the method used by the contracting officer in computing the pay quantities for sheeting (including shoring) was incorrect. Paragraph 3–06 (c) of the contract specifications states that sheeting and shoring, '* * * will be measured by the square foot of protected area.' The record shows that the pay quantities of sheeting placed adjacent to existing structures were determined by measurements to specific payment lines where such lines are shown on the drawings. Where specific payment lines were not indicated, the quantities were computed by using the length of the area actually sheeted and the difference in elevation between the top of the sheeting and the bottom elevation of the adjacent structures. The pay quantities for sheeting not placed adjacent to any existing structure were computed by multiplying the difference in elevation between the ground surface and the bottom elevation of the trench by the length of the area sheeted. You

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assert that because of the liability imposed by paragraph 1–14 (b) of the specifications for damages to structures in or
84 adjacent to the work, including damages caused by disturbance of foundations, that the term 'protected area' as used in paragraph 3–06 (c) must be construed to mean the ground area occupied by the adjacent structures and that the computation of pay quantities for sheeting placed to protect such structures must be based on the area thereof. As noted above the payment lines shown on the drawings for sheeting and shoring placed adjacent to the structures clearly indicate that the parties did not intend that payment should be made on the basis of the ground area of the buildings. Furthermore, the estimates [sic] pay quantity of sheeting was only 9,200 square fee approximately 10% less than the quantity of 10,152 square feet for which payment was made and only about 30% of the quantity for which payment is claimed. The contract does provide, as contended by you, that the quantities specified are only estimates. However, the buildings which were to be protected were clearly indicated on the contract drawings. The combined ground area of the buildings alone, aside from the other locations where the plans indicated sheeting was to be placed, is about 2½ times the total area for which it was estimated sheeting would be required. The payment lines indicated on the drawing and the discrepancy between the ground area of the buildings and the estimated quantity of the sheeting should have put you on notice that the Government did not intend that the pay quantities of sheeting and shoring placed adjacent to existing structures would be computed on the basis of the ground area of such structures. No objection has been made of the method employed by the contracting officer in computing pay quantities for sheeting not placed adjacent to structures. As the ground area occupied by a structure has no direct relation to the cost of placing sheeting and shoring adjacent to it, there would appear to be no reason to compute the pay quantities of sheeting placed adjacent to such structures on the basis of the ground area occupied and to compute the pay quantities of sheeting not so placed on an entirely different basis. Under paragraph 1–14 (b) of the specifications you are liable for damages to land as well as to structures. If your contention that the pay quantities of sheeting placed adjacent to existing structures must be computed on the basis of the ground occupied by said structures were to prevail, it would logically follow that the pay quantities for sheeting not placed adjacent to any existing structure should be computed on the basis of the land area protected, even though such area might conceivably comprise many acres. Such as [sic]
85 interpretation is obviously absurd. It is my finding that

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the methods employed by the contracting officer for computing the pay quantities of sheeting and shoring were correct."

CONCRETE FINISHING

28. Article 15 of the contract provides as follows:

"ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

Section 1–20 of the general provisions of the contract specifications provides:

"1–20. Claims, Protests, and Appeals.—(a) If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Chief of Engineers, whose decision shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, ruling, instructions, or decisions of the contracting officer shall be final and conclusive.

"(b) The Chief of Engineers has been designated by the Secretary of War as his duly authorized representative to make final decision and to take other action where the terms of the contract require that such decision or action shall be 'by the Head of the Department concerned or his duly authorized representative.' All appeals from decisions of the contracting officer authorized under the contract shall, therefore, be addressed to the Chief of Engineers, U. S. Army, Washington, D. C. The appeal shall contain
86 all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor in the contract."

Pertinent provisions of the contract specifications, Section VII, dealing with the subject "Concrete" are quoted below:

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SECTION VII. CONCRETE

* * * * *

"7.03. Proportioning and Mixing.—* * *

"(b) Proportioning. * * *

"(2) Control.—The exact proportions of all material entering into the concrete shall be as directed by the contracting officer. The contractor shall provide all equipment necessary to positively determine and control the actual amounts of all material entering into the concrete. The proportions will be changed whenever, in the opinion of the contracting officer, such change becomes necessary to obtain the specified strength and the desired density, uniformity and workability, and the contractor will not be compensated because of such changes, except for an increase in the specified minimum unit paste content, as provided herein as follows: In the event it is determined by the contracting officer that concrete of the desired quality cannot be obtained with the specified gradation of aggregates conforming fully to the specifications and the specified minimum unit cement content, he may direct an increase in the unit paste content by the addition of Portland cement, in which case compensation will be made therefor at the cost to the contractor of the cement delivered f. o. b. carrier at the site of the work, plus $0.40 per barrel.

* * * * *

"7–05. Details of Construction.—(a) Forms.—* * *

"(4) Removal.—Forms shall not be removed without the approval of the contracting officer, and all removal shall be accomplished in such manner as will prevent injury to the concrete. Forms shall not be removed from walls and vertical faces before the expiration of 2 days, except when specifically authorized by the contracting officer. When, in the opinion of the contracting officer, conditions on the work are such as to justify it, forms may be required to remain in place for longer periods.

* * * * *

"(d) Finishing.—Immediately following removal of forms, all form tie holes shall be filled, protruding fins or other surface irregularities removed by carborundum stone and all other de-
87 fects repaired. Where necessary to obtain a suitable surface finish, the contractor shall remove the forms and finish the surfaces when and as directed by the contracting officer at no additional cost to the United States. The curing specified in subparagraph 7–05 (e) following shall be temporarily suspended during such repairing or finishing as directed. The finished surfaces shall be free from sand streaks or other defects and the plastering over of such surfaces will not be permitted. Defective

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concrete shall be repaired by cutting out the unsatisfactory material and placing new concrete which shall be formed with keys, dovetails, and anchors to attach it securely to the other work. This concrete shall be drier than the usual mixture and shall be thoroughly tamped into place. All surfaces of concrete, not covered by forms, that are not to be covered by additional concrete or backfill shall have a wood float finish without additional mortar, and shall be true to elevations as shown on contract drawings. Striking-off and finishing shall follow closely the placing operation in order to insure completion before the initial set has taken place. The contractor will not be permitted to start a pour unless a sufficient number of qualified finishers are available to fulfill the above requirements. Care shall be taken to see that all excess water is removed before making the finish. Other surfaces shall be brought to the specified finished elevation and left true and regular as approved by the contracting officer. Where considered necessary by the contracting officer, or where indicated on the drawings, joints shall be made carefully with a jointing tool. Every precaution shall be taken by the contractor to protect finished surfaces from stains or abrasions. No fire shall be permitted in direct contact with any concrete at any time. Concrete surfaces or edges likely to be injured during the construction period shall be properly protected by leaving the forms in place or by erecting covers satisfactory to the contracting officer."

29. Section 1, paragraph 1–11, Work Covered by Contract Price, provides as follows:

"1–11. Work Covered by Contract Price.—The contractor shall, under the contract prices, furnish and pay for all materials, equipment, and labor for all permanent, temporary, and incidental work, furnish all accessories, and do everything which is necessary to carry out the contract in good faith, which contemplates everything completed, in proper working order, of good materials with skillful workmanship, accurately fitted, properly assembled, and connected."

88 30. The placement of concrete began on August 20, 1941, and placement was made from time to time during that construction season until October 24, 1941. During this time monoliths Nos. 1 through 17 were poured. The first concrete which was placed above the foundation and as to which the plaintiff's claim for finishing relates was commenced on September 5, 1941.

31. From the time that the forms were stripped from the exposed concrete lifts above the foundation, the defendant's field representatives complained to Mr. Gabriel, plaintiff's superintendent, of the poor faces on the exposed concrete. After monoliths Nos. 1 through 17 had been poured and the forms stripped from the concrete, there were rust stains showing from the water

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pipes used in curing, and the concrete faces showing numerous blemishes, pockmarks, and honeycombs. Protruding fins had not been removed, and the form tie rod holes had not been filled.

32. Prior to October 29, 1941, defendant complained to plaintiff regarding the tie holes not being plugged as required by paragraph 7–05 (d) of the contract specifications.

33. Under date of July 28, 1941, plaintiff transmitted to defendant some revised prints covering certain form details in the construction of the wall and which made reference to the proposed use of certain porcelain tubes or cylinders for the purpose of putting bolts through said porcelain cylinders which could act as spreaders and thereby increase or lessen the width of the forms.

34. Defendant, by letter dated August 4, 1941, approved plaintiff's revised prints subject to certain provisions which in part provided:

"(e) The approval as indicated above is predicated on producing a finished concrete surface as contemplated in contract specifications, and the right is reserved to require necessary revisions in your form construction to provide uniform finished surfaces on all exposed faces."

35. On October 15, 1941, defendant objected to the further use by plaintiff of visible porcelain tubes which gave the appearance of an unfinished job.

36. Under date of November 15, 1941, defendant wrote plaintiff regarding the unused porcelain tubes and therein stated that
89 plaintiff would be allowed to use these tubes on unexposed concrete wall surfaces and would be paid for the remaining unused porcelain tubes.

37. The defendant has allowed payment for porcelain tubes which were delivered by plaintiff to defendant but not used on the job.

38. On October 20, 1941, the contracting officer addressed and forwarded the following letter to the plaintiff:

"Reference is made to Par. 7–05 (d), Finishing of Concrete Surfaces, of your Contract No. W–321–eng–261 for the construction of the Elmira Flood Protection Project, Section 1.

"I have examined the concrete work constructed to date under your contract and find that it has not been finished in accordance with the provisions of the contract specifications. You are directed to correct these deficiencies at once. My field representatives will indicate the defective work and furnish details of the required corrective measures."

39. By letter dated October 29, 1941, defendant's Resident Engineer forwarded a detailed statement of corrective measures to be taken by the contractor in two parts, the first relating to the treatment of monoliths Nos. 1 through 17 which had then been

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placed, and the second relating to the treatment of concrete which had not then been placed. The detailed statement of corrective measures provides as follows:

"METHOD OF TREATING EXISTING WORK

"The surface to be treated will be scrubbed with a wire brush where necessary to clean out defective areas.

"Mix one part portland cement with two parts fine sand (similar to that used on the project from which particles retained on the No. 16 sieve has been removed) with water sufficient to produce a grout having the consistency of very thick paint. If necessary, white portland cement shall be added, replacing an equal quantity of standard cement, in a quantity sufficient to give a color equal to the concrete in the project. A test of the procedure and color will be made on a panel which is to be covered with backfill. This mixture shall be carefully worked out so that no difference in color will result from the grout. This mixture shall be allowed to set for 45 minutes before being used. The surface of the con-
90 crete to be treated shall be thoroughly wet, after which the grout shall be applied with a brush or cloth completely filling air bubbles and holes. Immediately after applying the grout scour the wall vigorously with a cork or wood float. The grout shall then be allowed to set partially for an hour or two, depending on the weather, until it has hardened sufficiently so that it can be scraped from the wall with the edge of a steel trowel without removing the grout from the small air holes. Next allow the surface to dry thoroughly one or two hours or more depending on the weather until the initial set occurs and rub it vigorously with a burlap bag to completely remove any dried grout. There shall be no visible film of grout remaining after this rubbing. The entire cleaning operation for any monolith shall be completed the same day it is started. The entire exposed surface of the monolith shall be treated in this manner. If any dark streaks or spots remain after this operation they shall be rubbed lightly with a fine carborundum stone. This rubbing must be carefully done to avoid changing the texture of the concrete.

"After the grout has become thoroughly set (24 hours in warm weather and 48 hours in cold weather) curing will commence and continue for at least seven days. Curing shall be accomplished by covering finished surfaces promptly with damp burlap or cotton quilts. (Heating will not be necessary on old walls.)

"METHOD OF TREATING NEW CONCRETE WORK

"The forms on work that is to be exposed shall be removed as soon as it is possible to do so without injury to the concrete. In

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warm weather (minimum 65° F., average 75° F.) this will be approximately 24 hours after the completion of placing. In colder weather the forms should be allowed to remain in place approximately 48 hours.

"Immediately after the forms have been removed all fins or other projections shall be broken off with a carborundum stone or other suitable tool which will remove the projections without marring the surrounding surfaces. Filling of form tie holes shall be concurrent with the removal of fins, etc. This operation shall be separate from general finishing and shall be accomplished with retempered mortar. This mortar shall have the same sand-cement ratio as the concrete in the original work. Sufficient water shall be added to make a dry mixture. This mortar shall be thoroughly mixed, allowed to set for one hour and then remixed before being used. The material shall be thoroughly tamped into the tie
91 holes and care shall be taken not to smear or deface the surrounding surfaces. Other patching of honeycomb or similar defects shall also be accomplished with sand-cement mortar as described above. All patches shall bond with the steel reinforcement and shall, if feasible, be dovetailed to the existing work. Dish shaped patches with sloping sides shall not be permitted.

"Upon completion of repair work as outlined above, the entire exposed surface shall be treated as follows:

"A thin sand-cement mortar shall be applied to the entire surface with a steel trowel. This mortar shall be composed of one part cement and two parts sand to which water shall be added until the mortar has the consistency of very thick paint. If necessary, white cement shall be used replacing an equal quantity of regular cement so that the dry mortar will have the same color as the concrete in the structure. Panels shall be experimented with on concrete surfaces which will be covered in order to assure this similarity in color. This application shall be sufficiently vigorous to insure the complete filling of all pockmarks or other blemishes. The sand for this mortar shall be the sand as regulaly [sic] used in the concrete work except that the sizes retained on a No. 16 sieve shall be removed. The mortar applied to the concrete surface shall be allowed to set for one hour and the surplus shall then be removed by scraping the surface lightly with the edge of a steel trowel or steel float. After the lapse of sufficient time to allow initial set or hardening of the mortar, the surface shall be vigorously rubbed with Clean Dry Burlap which shall entirely remove the mortar on the surface of the concrete. Initial curing shall be commenced immediately after this operation and shall consist of covering the finished surface with Clean Wet Burlap. Normal water curing will commence 12 hours later. Finishing of concrete surfaces shall be completed in the minimum possible

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time and in no case shall the finishing be extended over more than a 12 hour period. (This is specified because the color of the finished surface may vary with atmospheric conditions and make blending with adjacent finished surfaces difficult.)"

40. Upon receipt of the letter and its enclosure referred to in the foregoing finding, the plaintiff on October 31, 1941, addressed the following letter to the contracting officer:

"Receipt is acknowledged of your letter of October 29th relative to certain finishing which you desire us to do on the concrete already placed on this project. It seems wise at this time
92 to review briefly, for the record, the procedure which has previously taken place and which must therefore be responsible for the appearance of these concrete walls. Before reviewing this procedure, let me state that we are already proceeding to do as directed in your letter of October 29th, and that we will at all times proceed with any of your instructions, our desire, however being, of course, that we be protected insofar as the matter of reimbursement to us, for any expenses plus normal profit incurred in carrying out any such instructions, is concerned.

"The aggregates used in the Elmira work, gravel, sand, and cement, were all previously approved by your representatives and accepted for this work. The water is the same as that used by the people of Elmira for drinking water and has also been approved by your representatives. The characteristics of the mixture, insofar as the porportion [sic] of the component parts, was set by your representatives after exhaustive tests on their part. The form lining used was approved by your representatives and the forms themselves compare in construction very favorably as to strength, appearance, etc., with any used in the district, and this we have on the authority of the Acting Chief of Operations. We come, therefore, to the mixing and placing of the concrete, and at all times these procedures have been directly and completely under the control of your representatives. No latitude has been allowed us for the carrying out of any opposing ideas we may have had in this work, ideas which may or may not have secured a better result, but in any event we were not allowed to try them out. We must therefore, in view of all the above, respectfully suggest that the responsibility for any result which may not appeal to you, does not lie on our shoulders.

"It is our understanding that costs are being kept by your representatives as well as by ourselves on the additional expense that is now accruing because of the finishing operations which you have directed, and that on the conclusion of these operations a satisfactory settlement will be reached to reimburse us for this expense. If this understanding is not in accordance with yours, we should appreciate being advised at once.

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"Your consideration and advice on all the above will be appreciated."

41. After monoliths Nos. 1 through 17 were treated in accordance with the procedure outlined for existing work, the plaintiff submitted on November 27, 1941, a request for the payment of the sum of $864.07 covering the cost of such work.
93 This sum resulted after an allowance of $111.75 had been deducted as the cost of filling form tie rod holes.

On December 10, 1941, the contracting officer by letter acknowledged receipt of the above letter and stated as follows:

"I find that the finishing treatment required on your job is well within the intent of paragraph 7–05 (d), and I cannot consider additional payment for this work."

Following receipt of the above letter, Mr. Fred Davis, vice president of plaintiff, conferred with the District Engineer on December 15, 1941. After this conference, the plaintiff addressed the following letter to the contracting officer:

"As a result of a conference held this morning with the District Engineer, Mr. Samples, and myself, my understanding of the conclusions reached at this conference is outlined below.

"1. I understand that our company is not giving up any of our rights to future consideration of our claim for the cost of the treatment of the walls constructed during 1941 by reason of not appealing at this time the decision of the District Engineer outlined in his letter of December 10th.

"2. That consideration will be given to payment by the United States for any increase in our costs because of any change in the kind of aggregates composing the concrete mixtures or because of any change that may be prescribed in handling the concrete.

"3. That the treatment of the walls in the future will be modified, in that treatment will be required only on the land side of the walls except that at bridge approaches where treatment shall be on both sides of the walls for a distance of three or four monoliths from the bridge approach; such treatment shall immediately follow the removal of the forms and shall consist of rubbing the concrete with carborundum [sic] stone and brushing with a light coat of mortar if required. It will also, of course, be necessary for us to block the holes at the form tie rods.

"We would appreciate knowing as to whether your understanding is in general accordance with the above."

42. The contracting officer replied by letter of Decembr 29, 1941, as follows:

"Reference is made to your letter dated December 15, 1941, regarding your understanding of conclusions reached at a conference in my office on December 15, 1941, on concrete construc-

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94 tion at the Elmira Flood Protection Project, Section No. 1, Contract No. W–321–eng–261.

"Using the same numerical index as used in your letter you are advised that conclusions reached in the conference were as follows:

"1. Your right of appeal from my decision on payment for wall treatment is established in Article 15 of the contract.

"2. Any redesign of concrete mixtures or required changes in methods of handling concrete not within the scope of specifications which causes increased cost will be cause for consideration of increased payments to you.

"3. Treatment of walls will be required on the landside of all walls and on the streamside of walls approximately 100 feet upstream and downstream of all bridges, approaches, or other similar places where relatively close scrutiny is easily attained. In addition to the above treatment regular patching of tie rod holes, replacing unsatisfactory spots, repair of honeycombs, etc., will be required on all surfaces in accordance with specification requirements."

43. On February 9. 1943, the plaintiff filed a protest with the contracting officer listing five items of claim but not including the claim for concrete finishing. This was replied to by letter of February 18, 1943, by the contracting officer, in which the following statement is made:

"In view of the fact that your letter and this reply are repetitions of previous protests and decisions, and that no progress is apparent in the settlement of this dispute, it is suggested that, in event you elect to prosecute this matter further, you arrange to present detailed facts, computations, etc., either by letter or at a conference in this office."

On February 24, 1943, the plaintiff forwarded an executed copy of a release dated February 19, 1943. In this release, the plaintiff excepted a claim by reason of concrete finishing operations.

"* * * in a manner and to an extent not required by the contract plans and specifications. * * *"

The plaintiff suggested in the letter transmitting the release that $100 be withheld from payment due it on its final estimate. In this letter the plaintiff also discussed the concrete finishing claim and protested the sums allowed for the concrete items
95 in the final estimate and requested an opportunity to submit detailed data as to the cost of performing this "additional" work.

44. The contracting officer on March 5, 1943, sent the following letter to plaintiff:

"Receipt is acknowledged of your letter dated February 24, 1943, transmitting executed copies of standard release form for

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Contract No. W–321–eng–261, and an application for reconsideration of a previous appeal, addressed to the Chief of Engineers, relative to minimum wage rate.

"Reference is made to the exception listed in your formal release to Contract No. W–321–eng–261, and you are advised, as follows, as to the action taken by this office relative to the various claims.

"(a) The decision relative to additional payment for work in connection with treatment of concrete surfaces, was given in letter from this office dated December 10, 1941. Reference is made to letter from this office dated December 29, 1941, informing you of your right to appeal the decision of this office as established in Article 15 of the contract. As no appeal was made as per Article 15 of the contract, it is considered that your right to appeal has been forfeited.

"(b) A decision relative to the other exceptions to the release; namely, payment of Sheeting (Including Shoring) Contract Item No. 7; payment of Copper, Contract Item No. 28, and payment of Contract Item No. 6, Removal—Walls, Slabs, Paving, Building Foundations (Concrete or Masonry) was given in letter from this office dated February 18, 1943.

"Your right of appeal from my decision on payment of the items covered in paragraph (b) above is established in Article 15 of the contract. The time allowed for appeal will expire thirty days from date of this letter.

"You are further advised that a voucher is being prepared for your signature for the partial estimate now due, less $100.00, as requested in your letter of February 19, 1943."

45. The plaintiff on March 19, 1943, appealed the decision of the contracting officer of Fbruary 18, 1943, and claimed in addition to the sheeting and shoring item and other items not here material, a concrete finishing item of $7,082.74 of which $862.42 was claimed for the finishing of monoliths Nos. 1 through 17 as to which the detailed statement of corrective measures
96 related to the Method of Treating Existing Work, and $6,220.32 was claimed for the finishing of all other work as to which finishing was performed pursuant to the Method of Treating New Concrete Work contained in such detailed statement.

The contracting officer on June 2, 1943, forwarded his findings of fact on the plaintiff's claim to the Chief of Engineers. So far as here material, this finding of fact provides as follows:

"4. With reference to finishing concrete surfaces (paragraph 3a above), the contractor was required, in accordance with the contract specifications, to finish exposed concrete wall surfaces. The contractor offered verbal and written protest all of which were duly considered prior to the District Engineer's decision dated December 10, 1941 (Exhibit F), which denied the con-

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tractor's request for additional payment. After a conference in the District Engineer's office on December 15, 1941, the contractor forwarded the letter of the same date which he quotes on page 8 of his appeal. The District Engineer in turn with letter dated December 29, 1941 (Exhibit G), replied to the contractor's letter of December 10, 1941, and denied his request for additional compensation. The contractor was advised of his further rights of appeal under Article 15 of the contract. Records of this office do not disclose any further correspondence on this item of complaint prior to receipt of the final release (Exhibit Q), which was returned with letter dated February 24, 1943 (Exhibit D)."

On April 29, 1944, the contracting officer forwarded a supplement to his findings of fact dated June 2, 1943, to the Chief of Engineers. It provided as follows:

"1. The following facts concern that portion of the contractor's appeal pertaining to the finishing of concrete surfaces and is supplementary to the facts presented in paragraph four of Findings of Fact, dated 2 June 1943.

"2. Operations under the subject contract were commenced on 3 June 1941. Placement of concrete commenced on 19 August 1941 and a total of 955 cubic yards of Class A concrete, Item 20, was placed through 24 October 1941, the date concrete operations were suspended for the winter season. During the first season the contractor after the removal of forms did not attempt to patch holes or remove surface irregularities from the exposed
97 concrete surfaces as required by paragraph 7–05d of the contract specifications. The District Engineer on 15 October 1941 inspected the site of the work and verbally directed that immediate action be taken to remedy the unsightly condition presented by the unfinished concrete surfaces. The contractor was formally directed by letter dated 20 October 1941 (attached as Inclosure No. 1) to correct the surface deficiencies in a manner to be indicated by the resident engineer. The resident engineer by letter dated 29 October 1941 (see page 10 of contractor's appeal) furnished the contractor a complete set of instructions for the guidance of the contractor. Two procedures were outlined: the first pertained to finishing concrete placed and cured under the contract prior to the issuance of said instructions, the second procedure outlined a more timely method of finishing to be applied on subsequent work. The contractor complied with the instructions as outlined and by letter dated 27 November 1941 (attached as Inclosure No. 2) presented a bill in the amount of $864.07 for finishing 5,330 sq. ft. of concrete surface. The District Engineer by letter dated 10 December 1941 (Exhibit F of Findings of Fact) denied the contractor's request for additional payment on the

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grounds that the work performed was within the intent of the specification. The subsequent history is as outlined in paragraph 4 of the original Findings of Fact dated 2 June 1943."

46. Thereafter on June 19, 1944, the plaintiff filed with the Chief of Engineers a memorandum in further support of its appeal.

47. The Acting Chief of Engineers by letter of July 31, 1944, forwarded to plaintiff his decision denying the plaintiff's appeal which provided in pertinent part as follows:

"You claim additional compensation in the amount of $7,082.74 for finishing concrete in a manner allegedly not required by the contract specifications. It is not now contended by you that an appeal was taken within thirty days from the date of the contracting officer's decision denying your claim in the amount of $862.42 for finishing concrete erected in 1941 as required by paragraph 1–20 of the contract specifications. Thus further consideration of this item is precluded. In regard to the item of $6,220.32 for finishing concrete erected in 1942, the only question involved is whether instructions issued by the Contracting Officer for said work exceed the requirements of the contract. An examination of the applicable provisions of the specifications and the
98 instructions issued by the contracting officer clearly show that the claim for this item was properly denied. Paragraph 7–05 (d) of the specifications requires you to finish the concrete surfaces, '* * * as directed by the contracting officer * * *' without any compensation in addition to that provided in the contract unit prices for concrete. This provision does not obligate you to comply with arbitrary instructions issued by the contracting officer. It does require you, however, to comply with any reasonable instructions of the contracting officer and to finish the concrete in a sightly and workmanlike manner. The instructions issued by the contracting officer for finishing 'new concrete work' are reasonable and represent the minimum requirements for a workmanlike job. Your appeal for additional compensation for finishing concrete is therefore denied."

A reconsideration of the appeal was thereafter requested on behalf of the plaintiff and on October 1, 1946, the Chief of Engineers reaffirmed the action by the Acting Chief of Engineers of July 31, 1944, referred to above.

48. The plaintiff appealed the decision of the Chief of Engineers to the War Department Board of Contract Appeals. The president of this Board on January 10, 1947, as the authorized representative of the Secretary of War, dismissed the appeals following the decision of the Board which found that it had no jurisdiction to entertain them.

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49. On monoliths Nos. 1 through 17, 5,330 square feet of concrete surface was treated in accordance with the direction of the contracting officer. The plaintiff by its letter of November 27, 1941, claimed a total of $864.07 for such surface treatment, itemized as follows:

Labor

Oct. 27/41 to and incl. Nov. 18/41

124 Hours @ $1.50 per Hour	$186.00
127 Hours @ $1.25 per Hour	158.75
522.5 Hours @ $0.75 per Hour	391.87
20 Hours @ $1.87 per Hour	37.40
5 Hours @ $2.25 per Hour	11.25
6 Hours @ $0.80 per Hour	4.80
4 Hours @ $1.125 per Hour	4.50
Total labor	794.57
99 Less clean and plug form tie rod holes, 149 hours @ $0.75 per hour	—$111.75
Balance due a/c labor	682.82
Rent of scaffold (swinging)	18.00
Material of built scaffold	15.00
2 carborundum stones	2.50
2 trowels	1.70
3 wire brushed [sic]	1.80
2 plaster brushes	2.10
2 bags cement	1.19
1 bag cement (white)	2.50
0.2 ton sand	.40
Compenstion [sic] and other insurances @ $8.423 per hundred dollars of payroll	57.51
Total labor, material and accessories	785.52
10% on the above to allow for overheads and profit	78.55
Total	864.07

No proof of damages relating to the claim was made other than the claim itself.

50. The plaintiff claims as the extra cost to it of the concrete finishing during 1942, in accordance with the directions of the contracting officer relating to new work, the sum of $6,070.19 itemized as follows:

Labor	$5,934.64
Material	100.00
Small tools	50.00
Compensation, P. L. & P. D., $7.24 per H. of P. R.	429.67
State Unemployment, 2.7%	160.24
Social Security, 1%	59.35
Total	6,733.90
Profit, 10%	673.39
Total	7,407.29

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Chargeable to work as called for in the Specifications, 27,944 S. F. @ $0.05 per S. F., incl. all insurances, bond, profit, etc	$1,397.20
Balance	6,010.09
Bond	60.10
Total Claimed, 1942	6,070.19

100 It is noted that in the computation above a credit of five cents per foot is allowed by plaintiff as the cost which it feels is properly chargeable to it for the finishing according to the contract specifications.

Excepting such credit shown, the entire claim is based upon labor cost and other costs in turn based upon the cost of labor with the further exception of $150 for material and small tools. Since as the secretary of the plaintiff testified, certain original payroll records have been lost due to some cause beyond his knowledge, it is not possible to verify the extra cost of concrete finishing in 1942 relating to new work.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover, and it is therefore adjudged and ordered that it recover of and from the United States seven thousand four hundred sixty-three dollars and twenty-two cents ($7,463.22).

Opinion

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff brings this suit to recover under its contract with the War Department Corps of Engineers for the construction of a flood wall along the Chemung River in Elmira, New York. Plaintiff presents three claims as follows:

Claim for reimbursement of wage rates paid to carpenters, laborers, and concrete puddlers	$15,597.38
Claim regarding measurement of sheeting and shoring	14,785.55
Claim for finishing of concrete	6,934.26
Total	37,317.19

Plaintiff's first claim is that it was misled by defendant as to the wages it would be required to pay in carrying out the contract. Briefly stated, the facts anent this controversy are these:

On March 29, 1941, plaintiff received from the Binghamton, New York, District office of the Corps of Engineers an invitation to bid upon the construction of Section 1 of the Elmira Flood Protection Project. Plaintiff submitted a bid which defendant

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accepted on May 14, 1941. Formal notice to proceed was issued on June 5, 1941.

101 The Standard Government Form of Invitation to Bid contained the following provision:

"*Investigation of Conditions.*—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, *availability of labor*, uncertainties of weather, and other contingencies. * * * Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work." [Italics supplied.]

However, the contract specifications attached to the Invitation for Bids contained the following provision:

"1–31. Wage and Labor Provisions.—(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

Designation	*Wage rate, hourly*
Carpenters, journeymen	$1.00
* * * * *	
Laborers, unskilled	.50
Laborers, concrete puddlers	.50
* * * * *	

This minimum determination had been made by the Secretary of Labor on January 31, 1941, at the request of the Corps of Engineers preparatory to including it in the Invitation for Bids for this contract. Such a determination was required by the Davis-Bacon Act of August 31, 1935, 49 Stat. 1011, 40 U. S. C. §§ 276a, 276a–1.

However, at the time defendant issued the invitation for bids on March 29, 1941, and included therein the foregoing specifications relative to wage rates, the Secretary of Labor had since issued a new determination of the prevailing wage rates for Elmira. This was furnished to the Public Buildings Administration on March 4, 1941. In this it was said that the prevailing wage rates were as follows:

Classification	*Hourly rate.*
Carpenters, journeymen	$1.125
Laborers, unskilled	.55

102 This was not communicated to the Corps of Engineers, but the District Engineer was informed by the labor union as early as October 22, 1940, that a $0.125 per hour increase for carpenters would take effect on January 1, 1941. Despite this

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knowledge, the District Engineer before inviting bids on March 29, 1941, did not attempt to ascertain whether or not the Secretary of Labor had made a redetermination of the prevailing wage rates since his determination of January 29, 1941. Had he done so he would have learned of the determination of March 4, 1941.

Prior to the submission of its bid, plaintiff did not attempt to make an independent investigation of the prevailing wage scale for the classes of labor to be utilized on this contract, but it computed its bid in reliance upon the schedule of minimum wage rates contained in the specifications furnished.

When work on the project was started on June 3, 1941, plaintiff was unable to obtain workmen for the rates specified, but had to pay the prevailing union rate of $0.625 per hour for unskilled laborers, including concrete puddlers, and $1.125 per hour for carpenters. The rate for carpenters was put into effect on January 1, 1941. Prior to the Invitation for Bids the rates for common laborers had increased from $0.50 to $0.55, and on April 1, 1941, they had risen to $0.625.

Plaintiff promptly notified the District Engineer, the contracting officer, that the minimum wage rates set forth in the contract specifications were less than the currently prevailing rates, but plaintiff was informed by the District Engineer on June 27, 1941, that the minimum wage rates had been determined in accordance with the applicable law and regulations, and, consequently, that he could not grant any relief. Plaintiff appealed this decision to the Chief of Engineers on July 10, 1941. This appeal was denied by the Chief of Engineers on August 5, 1941, principally on the ground that he lacked authority in law "to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions of the above cited act [49 Stat. 1011]."

Following the completion of this project in December 1942, plaintiff on February 20, 1943, requested the Chief of Engineers to reconsider his action in dismissing its appeal of July 10, 1941.

On April 13, 1943, the Chief of Engineers declined to change
103 his earlier decision stating (1) that the contract made no representation as to the actual wage scales which would be in effect, and (2) that the increased costs did not arise from plaintiff's contract obligations but from economic conditions which were ordinary contingencies contemplated under the terms of the contract.

The specifications furnished to plaintiff in connection with the invitation to bid specified the minimum wages to be paid in accordance with the determination of the Secretary of Labor. This determination was made by him pursuant to the requirements of the Davis-Bacon Act, supra, which required him to determine the minimum wages to be paid "based upon * * * the wages * * *

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determined * * * to be prevailing" in the locality. His determination, therefore, so far as plaintiff's rights are concerned, amounted to a determination of the prevailing wage. When made, his determination was correct, but before bids were invited, wages had gone up and he had made a new determination. Thus, when the Corps of Engineers represented that the Secretary of Labor had determined the prevailing wage rates to be $0.50 and $1, this was a misrepresentation, although an unintentional one. Nevertheless, it was one upon which plaintiff was entitled to rely.

It was a positive representation, and, therefore, one from the consequences of which the defendant cannot be relieved because of the provision requiring the contractor to investigate "the availability of labor." When defendant made this representation it assumed responsibility for its accuracy.

The fact that such a determination had been made some months before bids were requested does not relieve defendant. Plaintiff was entitled to rely on it as the Secretary's latest determination—as a representation of the wages it would have to pay when the work was to be done.

The District Engineer had been advised by the union months before the Invitation for Bids was issued that the rate for carpenters would be increased effective on January 1, 1941. Before issuing the invitation he should have made certain that the rates in effect were those he was representing them to be.

Plaintiff, therefore, is entitled to recover the difference between the wages specified in the Invitation for Bids ($0.50 and
104 $1.) and those which the Secretary of Labor determined on March 4, 1941 to be the prevailing wages ($0.55 and $1.125). Albert & Harrison, Inc. v. United States, 107 C. Cls. 292, 68 F. Supp. 732, cert. denied, 331 U. S. 810. In Irwin & Leighton v. United States, 115 C. Cls. 18, 32, the Court held that there was no misrepresentation. It did not intend to hold and did not hold that had there been a misrepresentation plaintiff could not recover.

Plaintiff urges that an additional misrepresentation took place following the issuance of invitations to bid and prior to the acceptance of plaintiff's bid when the District Engineer failed to obtain from the Secretary of Labor an amendment of the contract wage schedule to reflect the increase from $0.55 to $0.625 obtained by the union for unskilled laborers and concrete puddlers on April 1, 1941. However, plaintiff has failed to establish any of the circumstances surrounding this increase, so that it is impossible to determine whether the District Engineer knew or should have known of its existence at the time he awarded this contract to plaintiff. Furthermore, the evidence does not reveal that the Secretary of Labor made a wage determination recognizing this rate prior to the acceptance of plaintiff's bid. In the absence of such

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proof there is no foundation for the claim that the District Engineer misrepresented to plaintiff the existence of this additional increase.

Plaintiff's next claim is that defendant incorrectly computed the amount due for "sheeting and shoring."

The construction of the new flood wall necessitated much trench excavation, both in open unimproved areas and also in close proximity to six buildings adjacent to the project site. In order to maintain safe working conditions and in order to furnish adequate lateral support for the adjoining structures, the contract called for the installation of an estimated quantity of 9,200 square feet of sheeting and shoring. It provided that plaintiff was to receive $0.65 per square foot for the quantities actually installed to be measured by the "square foot of the protected area."

Plaintiff accepted, without protest, monthly payments for this work based upon the estimates of the defendant's resident engineer, but, when on completion of the project the Government's final estimate of the sheeting and shoring installed was substan-
105 tially less than plaintiff's computation, plaintiff protested and requested information as to the method used by the Government in obtaining its total. Plaintiff was advised that of the 10,152.1 square feet of sheeting and shoring contained in the Government's final estimate, 6, 738.2 square feet were for the protection of the work (trenches) and 3,413.9 square feet were for the protection of adjacent property.

Plaintiff disagreed with this computation and on February 9, 1943, wrote to the District Engineer requesting a recomputation. The District Engineer denied this request, saying that the measurements had been made in strict accordance with the provisions of the contract specifications. Plaintiff on March 19, 1943, filed an appeal with the Secretary of War, but the Secretary of War denied plaintiff's appeal, stating in part as follows:

"* * * The record shows that the pay quantities of sheeting placed adjacent to existing structures were determined by measurements to specific payment lines where such lines are shown on the drawings. Where specific payment lines were not indicated, the quantities were computed by using the length of the area actually sheeted and the difference in elevation between the top of the sheeting and the bottom elevation of the adjacent structures. The pay quantities for sheeting not placed adjacent to any existing structure were computed by multiplying the difference in elevation between the ground surface and the bottom elevation of the trench by the length of the area sheeted. * * *"

Plaintiff agrees with defendant's method of computation of the shoring for the protection of the work, but says that the computation was in error.

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In many decisions both this court and the Supreme Court have held that under contracts similar to the one in this case, the decision of the contracting officer on the amount of work done is conclusive. See e. g., B–W Construction Co. v. United States, 101 C. Cls. 748, 768, reversed on other grounds, 324 U. S. 768; Penker Construction Co. v. United States, 96 C. Cls. 1; Wunderlich v. United States, 342 U. S. 98.

As to the computation for the protection of the buildings adjacent to this project, plaintiff urges that under the terms of the specifications, which provided that sheeting and shoring would be measured by the "square foot of the protected
106 area," the District Engineer should have computed the pay quantities on the basis of the ground area of the buildings and structures so protected, that is to say, if the building to be protected had a total area of 100′ x 50′, it should be paid for 5,000 square feet. Defendant computed the amount by taking the difference between the "top of the sheeting and the bottom elevation of the adjacent structures."

We must, therefore, determine the meaning of the term "protected area" as used in the specification. The decision of the District Engineer upon this question is not final. Bell Aircraft Corp. v. United States, 120 C. Cls. 398, 100 F. Supp. 661, cert. granted, 343 U. S. 913; McWilliams Dredging Co. v. United States, 118 C. Cls. 1; W. E. Callahan Construction Co. v. United States, 91 C. Cls. 538.

Both sides have offered expert testimony to aid the court in determining the meaning of this term. It shows that the purpose of this sheeting and shoring was to replace the natural support removed in the course of excavation. The ground area of a structure from which a portion of the natural support has been removed does not appear to have any reasonable relationship either to the amount or to the cost of providing the substitute support. Rather, the "protected area" is the area of the surface laid bare by excavation, such as the foundation wall of a building next to which sheeting is placed. Defendant computed it on this basis. Plaintiff is not entitled to recover upon this cause of action.

Plaintiff's next claim is on defendant's requirements for the finishing of the concrete.

The contract specifications contained detailed instructions as to the manner in which the concrete was to be mixed, placed, cured and finished. Paragraph 7–05 (d) of the specifications provided:

"(d) Finishing.—Immediately following removal of forms, all form tie holes shall be filled, protruding fins or other surface

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irregularities removed by carborundum stone and all other defects repaired. Where necessary to obtain a suitable surface finish, the contractor shall remove the forms and finish the surfaces when and as directed by the contracting officer at no additional cost to the United States. The curing specified in subparagraph 7–05 (e) following shall be temporarily suspended during such
107 repairing or finishing as directed. The finished surfaces shall be free from sand streaks or other defects and the plastering over of such surfaces will not be permitted. Defective concrete shall be repaired by cutting out the unsatisfactory matereial and placing new concrete which shall be formed with keys, dovetails, and anchors to attach it securely to the other work. This concrete shall be drier than the usual mixture and shall be thoroughly tamped into place. * * *"

When the forms were stripped from monoliths Nos. 1 through 17 an unsightly and unsatisfactory surface condition was revealed. Portions of the surface were stained with rust from the water pipes used in curing. Other areas showed numerous honeycombs, air bubbles, and pockmarks. Defendant's resident engineer called these conditions to the attention of plaintiff's superintendent and directed him to finish these surfaces in the manner he said was required by the contract specifications. These instructions were disregarded until on October 20, 1941, the contracting officer directed the following letter to plaintiff:

"Reference is made to Par. 7–05 (d), Finishing of Concrete Surfaces, of your Contract No. W–321–eng–261 for the construction of the Elmira Flood Protection Project, Section 1.

"I have examined the concrete work constructed to date under your contract and find that it has not been finished in accordance with the provisions of the contract specifications. You are directed to correct these deficiencies at once. My field representatives will indicate the defective work and furnish details of the required corrective measures."

Thereafter, on October 29, 1941, defendant's resident engineer furnished plaintiff with a detailed statement of the corrective measures which were to be taken, which required plaintiff, among other things, to remove all protruding fins, cut out and patch honeycombs, fill the form tie rod holes, and then place over the entire surface a thin coat of mortar composed of sand and white portland cement.

On October 31, 1941, plaintiff replied to the District Engineer stating that it would carry out such instructions subject to its right to recover the resulting additional expenses. After finishing the surfaces of monoliths Nos. 1 to 17 in accordance with these instructions, plaintiff, on November 27, 1941, submitted a

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108 request to the District Engineer for the payment of $864.07 to cover the cost of this portion of the work. The District Engineer on December 10, 1941, denied plaintiff's request because, he said, the finishing treatment was required by the specifications. Plaintiff's additional claim of $6,070.19 for the cost of finishing the surface of concrete placed in 1942 was denied on the same grounds, as were plaintiff's subsequent appeals.

We think the District Engineer's decisions were correct. While the original contract specifications indicated in a general way the results to be obtained, they did not specify in detail any particular method to be used by the contractor in obtaining a suitable surface finish. It was thus necessary and proper for the District Engineer, upon whom, as contracting officer, responsibility for the satisfactory performance of this project was placed, to direct the issuance of instructions supplementing, where necessary, the original specifications. Barlow v. United States, 35 C. Cls. 514.

Paragraph 7–05 (d) of the specifications required that the finished surface of the concrete "shall be free from sand streaks or other defects" and it prohibited "the plastering over of such surfaces." It also provided:

"* * * Where necessary to obtain a suitable surface finish, the contractor shall remove the forms and finish the surfaces when and as directed by the contracting officer at no additional cost to the United States. * * *"

No more was required of plaintiff than was justified by the specifications.

In addition to the $100 which the United States withheld from the final payment made to plaintiff, and which the United States concedes to be due and owing, plaintiff is entitled to recover $7,363.22, making a total of $7,463.22.

It is so ordered.

HOWELL, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

109 *Judgment of the court*

Filed October 7, 1952

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States seven thousand four hundred sixty-three dollars and twenty-two cents ($7,463.22).

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111 *Proceedings after entry of judgment*

On December 5, 1952, plaintiff filed a motion to amend the judgment of the court, or in the alternative, for a new trial.

On December 22, 1952, defendant filed a motion for a new trial.

On January 13, 1953, the court entered the following order on said motions:

ORDER

These cases come before the Court on motions for rehearings, amendment of judgments or new trials under Rule 53 of the Rules of this Court, on consideration thereof,

It is ordered this thirteenth day of January, 1953, that said motions be and the same are overruled as follows:

"48525. Binghamton Construction Company, Inc. Plaintiff's motion to amend judgment or for new trial and Defendant's motion for new trial."

* * * * *

By the Court:

(S) MARVIN JONES,
Chief Judge.

113 [Clerk's certificate to foregoing transcript omitted in printing.]

114 In the Supreme Court of the United States

No. 65, October Term, 1953

THE UNITED STATES, PETITIONER

v.

BINGHAMTON CONSTRUCTION CO., INC.

Order extending time to file petition for writ of certiorari,

Upon consideration of the application of counsel for petitioner

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 13th, 1953.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 13th day of April 1953.

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115 In the Supreme Court of the United States

No. 78, October Term, 1953

BINGHAMTON CONSTRUCTION CO. INC., A CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA

Order extending time to file petition for writ of certiorari

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 18, 1953.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 13th day of April 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

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SUPREME COURT OF THE UNITED STATES

No. 65, OCTOBER TERM, 1953

THE UNITED STATES, PETITIONER,

vs.

BINGHAMTON CONSTRUCTION CO., INC.

Order allowing certiorari. Filed October 12, 1953

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 65

THE UNITED STATES, PETITIONER

v.

BINGHAMTON CONSTRUCTION CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on October 7, 1952, by the United States Court of Claims.

OPINION BELOW

The opinion of the Court of Claims (R. 65) is reported in 107 F. Supp. 712.

JURISDICTION

The judgment of the Court of Claims was entered October 7, 1952 (R. 72). Both parties moved for a new trial. The motions were overruled on January 13, 1953 (R. 73). Plaintiff's motion to

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renew its motion for new trial was overruled on February 25, 1953. On April 11, 1953, Chief Justice Vinson extended the time of the United States within which to file a petition for a writ of certiorari to and including May 13, 1953 (R. 73). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the schedule of minimum wage rates specified in a government construction contract, pursuant to the Davis-Bacon Act, is a representation or warranty to the successful bidder that it will not have to pay higher wages to attract workers.

STATUTE INVOLVED

The Davis-Bacon Act (Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494, as amended by the Act of August 30, 1935, c. 825, 49 Stat. 1011, 40 U.S.C. 276a) provides in pertinent part:

> * * * That the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil

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subdivision of the State in which the work is to be performed * * * ; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work * * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications * * *.

PROVISIONS OF THE CONTRACT INVOLVED

Section 1-31 of the specifications furnished bidders provided:

1-31. *Wage and Labor Provisions.*

(a) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

Designation	*Wage rate-hourly*
Carpenters, Journeymen.....	$1.00
* * * * *	
Laborers, unskilled.....	0.50
Laborers, Concrete Puddlers.....	0.50

Article 17 of the contract involved (No. W-321-eng-261) reads as follows:

Article 17. *Rate of Wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a-1

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[40 U. S. C. A. §§ 276a, 276a-1]), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).—

* * * * *

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

Paragraph 1-12 of the Standard Government Form of Invitation for Bids provided in pertinent part as follows:

Investigation of Conditions.—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local

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conditions, availability of labor, uncertainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site * * *. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work.

STATEMENT

On January 31, 1941, upon the request of the Corps of Engineers, the Secretary of Labor furnished a schedule of minimum wages for inclusion in the contract specifications for a flood protection project (Flood Protection Project (Section No. 1)), along the north bank of the Chemung River, within the limits of the city of Elmira, New York. This schedule, which set the hourly wage rate for carpenters at $1.00 per hour and for unskilled labor at $.50 per hour, was included in the specifications furnished to respondent prior to the computation of its bid. In response to invitations for bids issued on March 29, 1941, respondent submitted a bid, based upon a unit price applied to the various operations involved in the performance of the work, in the amount of $232,669.30. The Government accepted respondent's bid on May 14, 1941. It entered into a written contract, No. W-321-eng-261, approved June 3, 1941. On June 5, 1941, respondent received formal notice to proceed with the work.

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On October 22, 1940, the Elmira business agent of the carpenters' local informed the United States Engineer's Office in Binghamton, New York, that the wage scale for carpenters would be increased from $1.00 per hour to $1.125 per hour as of January 1, 1941 (R. 43). On October 29, 1940, receipt of the letter was acknowledged (R. 43).

On March 4, 1941, prior to the issuance of the invitations for bids on the Chemung River project, the Secretary of Labor had furnished the Public Buildings Administration of the Federal Works Agency "a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira" (R. 44). The schedule showed the prevailing hourly rates on that type of project for Journeymen Carpenters at $1.125 and for unskilled laborers as $.55.

Although not so required, respondent employed only union labor on the flood protection project. On June 3, 1941, when respondent began work on the site it had to pay $.625 per hour for laborers and $1.125 per hour for carpenters. The carpenter wage rate had been put into effect by the union on January 1, 1941, and the laborer wage rate on April 1, 1941.

On June 16, 1941, respondent advised the District Engineer (who was also the contracting officer) that the minimum wage rates provided in the contract specifications were less than the rates currently prevailing in the Elmira locality (R. 44). When relief was denied, respondent protested to

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the Chief of Engineers who denied the appeal and disclaimed authority to question the correctness of any determination made by the Secretary of Labor (R. 44). On reconsideration, respondent received a reply reading in part as follows:

> A determination as to the accuracy of the specified wages is not necessary to a decision in this case. The contract by Article 17 and by paragraph 1-31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract. No reason has been shown which would warrant modification of the previous decision dated August 5, 1941.

Respondent thereupon brought suit in the Court of Claims on various items, *inter alia* for $15,597.38, the difference in cost between $1.00 and $1.125 (in wages for carpenters) and between $.50 and $.625 (in wages for unskilled laborers and concrete puddlers). The Court of Claims specifically found that "If plaintiff's president had investigated wage rates, he could have ascertained that the prevailing rate for carpenters was $1.125 per hour, and that the prevailing rate for unskilled labor was $.55 per hour, with an advance to $.625 per hour effective as of April 1, 1941" (R. 45). Nevertheless, it al-

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lowed respondent to recover $7,363.22, on the ground that when the Corps of Engineers represented that the Secretary of Labor had determined the prevailing wage rates to be $.50 and $1.00, this was a positive misrepresentation of the Secretary's latest determination, upon which respondent was entitled to rely. It was "a representation of the wages it would have to pay when the work was to be done." (R. 68).[1]

REASONS FOR GRANTING THE WRIT

The short of this case is that the Court of Claims has turned the contractual provision required by the Davis-Bacon Act—that respondent pay laborers on its project not less than prescribed minimum wages—into a warranty by the United States that the respondent will be able to obtain laborers at those minimum rates. This interpretation of the standard building contract provision for minimum wages plainly goes beyond its terms and scope, and thrusts an unjustified burden upon the Government which is compelled by the statute to use such a clause.

1. The Davis-Bacon Act was designed for the benefit of workers in the construction field, and minimum wage schedules are required by the Act to be included in building contracts solely to fulfil

[1] The recovery did not include the difference between $.55 and $.625, which was the increase the union obtained for unskilled labor on April 1, 1941; it was not shown that the District Engineer knew or should have known of the increase, and the evidence did not show whether the Secretary of Labor had made a wage determination recognizing this rate prior to the acceptance of respondent's bid.

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the legislative purpose of putting a floor on wages and thus protecting workers against substandard wages. *United States* v. *Morley Const. Co.*, 98 F. 2d 781, 788 (C.A. 2), certiorari denied, 305 U.S. 651; *Gillioz* v. *Webb*, 99 F. 2d 585 (C.A. 5); cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128. The precise terms of the contract bear out this reading that protection of the builder's employees is the only purpose of the minimum wage provisions. Specification 1-31 (*supra*, p. 3) declares that the Secretary of Labor has determined that certain "minimum wage rates" are to be applicable in the locality of the work, and then goes on to provide that in accordance with Article 17 of the contract "employees at the site shall be paid not less than these wages * * *".[2] Article 17 gives the Government the right to terminate the work if the contractor pays *less* than the required wages. In the context of Article 17 and the Davis-Bacon Act, specification 1-31 represented the objective and true fact that the Secretary of Labor had determined that carpenters would have to be paid $1.00 an hour and unskilled laborers $.50 an hour to comply with the minimum wage statute. Nowhere within the four corners of the contract is there a representation or warranty that the minimum

[2] The specification states that "In accordance with Article 17 of the contract, employees at the sites shall be paid *not less* than these wages as listed below" (emphasis added). In contrast, in *Irwin & Leighton* v. *United States*, 115 C. Cls. 18, 23, 33, where the Court of Claims held there was no misrepresentation by the Government, the specification read that "The wages *to be paid* laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing * * * *are as follows*: * * *" (emphasis added).

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wage is the maximum or the only wage that will have to be paid. *Winn-Senter Constr. Co.* v. *United States,* 110 C. Cls. 34, 61. Nor can such a warranty be reasonably implied. The Government's sole concern was with assuring that the builder would pay *at least* the prescribed minima, and the employees would receive *at least* those amounts. The Government was not concerned to protect the contractor against paying higher wages nor to guarantee to him that sufficient employees could be hired at the established minimum.

The Davis-Bacon Act does admonish the Secretary to base the contractual minima on the wages "prevailing" in the locality, and it is on this statutory requirement that the Court of Claims pins its conclusion that the wage schedule in this case was a misrepresentation, since the prevailing rates were found to be higher.[3] But a statement or declaration by one party, made for a limited purpose, cannot be held a misrepresentation in other contexts if the second party is not entitled to rely on it for such other purposes. And it is plain, both from the terms and aims of the Davis-Bacon Act and from the wording and purpose of the contract provisions, that the Secretary made her determination of minimum wages solely to protect the workers and to fulfil the demands of the minimum wage law and not for the benefit of the contractor by giving him information as to the wages at which he could attract workers. Indeed, the Secretary

[3] The contract itself does not refer to "prevailing" wages but speaks only of "minimum wage rates". *Supra,* pp. 3-4.

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had no authority to determine "prevailing" or minimum wages for any end not related to her protective functions under the Davis-Bacon Act.

All this is made even clearer by other significant contractual provisions clearly warning the contractor to inquire for himself. Paragraph 1-12 of the Invitation for Bids (*supra*, pp. 4-5) calls upon bidders to ascertain for themselves "the difficulties attending the execution of the proposed contract, including local conditions, availability of labor * * *."[4] Information as to wage rates would be at least equally accessible to a local contractor doing business in the community, and the Court of Claims expressly found that "If plaintiff's president had investigated wage rates, he could have ascertained" the true prevailing rates and the wages the union would insist on (R. 45).[5] Moreover, contractors know in advance that the Secretary's determination can be, at best, only an approximation.[6] For the court to increase the contract price after completion of the work, on the basis of a judicial redetermination of prevailing wages, would confer an unfair preference on contractors who neglect to comply with the clear warning to investigate, over diligent bidders who do in-

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[4] Of course, the "availability of labor", of which the bidders were to make their own estimates, is directly related to the wage level.

[5] The contract did not expressly or impliedly require the contractor to supply union labor. See *supra*, p. 6.

[6] The procedure and sources for the predetermination of rates of wages, described in Title 29, C.F.R. Subtitle A, Part 1, Secs. 1.1-1.20, show the inevitability of differences of opinion.

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vestigate and therefore anticipate the possibility of higher wage levels in making their bids.

To evolve representations and warranties from determinations made to prevent underpayment of workers also contravenes the consistent procurement policy of the Government, which has been to prevent reliance by contractors on general statements by government officers in place of their own diligent investigations, appraisals, and exercise of business judgment. This policy is reflected both in disclaimer provisions and in provisions requiring contractor self-reliance and charging contractors with possession of the knowledge their own investigation would have disclosed[7] The Court of Claims enlarges the Government's obligations beyond those expressly or by fair implication assumed, in the face of repeated admonitions by this Court. *Smoot's Case,* 15 Wall. 36, 45. The court below "was more generous * * * than the language of the contract requires." *Southern Ry. Co.* v. *United States,* 322 U.S. 72, 76-77.

2. In rejecting the Secretary's wage determination as incorrect, the Court of Claims in effect subjected it to judicial review at the contractor's instance, contrary to the settled rule. *Alliance Construction Co.* v. *United States,* 79 C. Cls. 730, 735; *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 127. And it is irrelevant, in this connection, that the Secretary later made a wage determination in the

[7] See *Maguire & Co.* v. *United States,* 273 U. S. 67; *MacArthur Bros. Co.* v. *United States,* 258 U.S. 6; *United States* v. *Silverton,* 200 F. 2d 824, 827 (C.A. 1).

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locality higher than that prescribed for this particular contract (*supra*, p. 6). Even if the subsequent finding were admittedly inconsistent, the bidder or contractor would have no standing to complain, since these wage determinations are solely for the employees' benefit and not his. As long as the Government abides by the earlier determination and does not insist on payment of the intervening increase, the contractor has nothing to challenge.

But the fact is that here there was no inconsistency between the earlier and later findings. As bidders know, the time lag between a request for a wage determination, on the one hand, and completion and reporting of the Secretary's holding, on the other, is usually two or three months; it is obvious that changes may occur and are foreseeable by both parties.[8] The Government plainly did not insure against an increase in wage levels between the time the determination is made and the time (i) the invitations to bid are drawn up and are issued, (ii) the bids are filed, (iii) the successful bidder is notified that he has been awarded the contract, and (iv) work on the project is begun.

Moreover, the second determination in this case

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[8] See Title 29, C.F.R., Subtitle A, Part 5, Sec. 5.4. Under the 1935 amendment, the Secretary writes the prevailing rate of wages into the contract in advance rather than after a dispute has arisen, as under the 1931 Act. *Gillioz* v. *Webb*, 99 F. 2d 585, 587 (C.A. 5).

S. 3487, as amended, 72nd Cong., 1st sess., would have had the predetermined wage rates increase or decrease during the performance with a corresponding adjustment in the contract price. H. Rep. 1441, 72nd Cong., 1st sess.; 75 Cong. Rec. 12381-7. It was vetoed. S. Doc. 134, 72nd Cong., 1st sess.

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was for entirely different work, a separate housing project, and the Secretary made no new determination for the flood protection project on which respondent was the contractor.[9] It is for this reason that *Albert & Harrison, Inc.* v. *United States,* 107 C. Cls. 292, certiorari denied, 331 U.S. 810, on which the court relies (R. 68), does not support it here. We believe that the *Albert & Harrison* decision was erroneous, but it is significant that, in any event, the alleged misrepresentation there was

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[9] There may be different determinations by the Secretary of Labor for different projects in the same city. The Act requires a determination of wages prevailing on projects of a character similar to the contract work.

The finding that "On March 4, 1941, the Secretary of Labor furnished to the Public Buildings Administration of the Federal Works Agency a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira, New York" (R. 44), neither matches nor supports the opinion, which states that at the time of the invitation for bids on March 29, 1941, "the Secretary of Labor had since issued a new determination of the prevailing wage rates for Elmira" (R. 66). All the Secretary had actually done was to make a determination of wages on a separate housing project. The findings do not justify the inference that the January 29, 1941, determination for the flood project, so far as it went, was superseded. Cf. *Irwin & Leighton* v. *United States,* 115 C. Cls. 18, 41-42.

But unless a superseding determination was made, the whole misrepresentation hypothesis falls. The Court of Claims took judicial notice of an identity that may very well not exist. Building houses may call for higher skill and be more exacting than erecting and placing the wooden forms or supports to hold the concrete poured for the walls of flood protection projects. And by the Court of Claims' own approach (as to the increase from $.55 to $.625 for laborers) "a wage determination recognizing" a new rate "prior to the acceptance of plaintiff's bid" is a requisite (R. 69). The contracting officer's failure to ascertain, before inviting bids, whether or not the Secretary of Labor had made a redetermination of the prevailing wage rates after her determination of January 29, 1941, is without significance if no redetermination had in fact ever been made. The January 29, 1941, determination would still be the latest determination, and the only one applicable to the flood project.

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as to the wage rate the Secretary of Labor had fixed on April 4, 1941, a week before the invitation to bid was issued. The bricklayers demanded the prevailing rate as determined in April by the Secretary of Labor for the same Raritan Arsenal instead of rates determined October 26, 1940; the contracting officer, although he knew of the higher rate for the Arsenal, withheld it from the contractor.

3. The Government enters into a large number of construction contracts each year, most of which are subject to the Bacon-Davis Act. The holding which the Court of Claims reaffirms here puts the Government under a continuing duty to check wage rates and keep all bidders advised; on the other hand, it not only relieves the contractor of the risk of ascertaining the wages which it took by entering into the contract without investigating (cf. *Slaughter's Administrator* v. *Gerson,* 13 Wall. 379), but justifies it in building on the Secretary's determination as an assurance of what it will have to pay. If this ruling is to be followed, the consequence will have to be either an uncalled for and burdensome change in Bacon-Davis procedures or the imposition of large and unnecessary costs on the Government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

MAY, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 65

THE UNITED STATES, PETITIONER

v.

BINGHAMTON CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 65-72) is reported in 123 C. Cls. 804.

JURISDICTION

The judgment of the Court of Claims was entered October 7, 1952 (R. 72). The Government's petition for a writ of certiorari was filed May 12, 1953, and granted on October 12, 1953 (R. 73, 75). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

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QUESTION PRESENTED

Whether the schedule of minimum wage rates specified in a government construction contract, pursuant to the Davis-Bacon Act, is a representation or warranty to the successful bidder that it will not have to pay higher wages than those in the schedule to attract workers.

STATUTE INVOLVED

The Davis-Bacon Act (Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494, as amended by the Act of August 30, 1935, c. 825, 49 Stat. 1011, 40 U.S.C. 276a) provides in pertinent part:

> * * * That the advertised specifications for every contract in excess of $2000, to which the United States or the District of Columbia is a party, for construction * * * of public buildings or public works of the United States * * * which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State * * * in which the work is to be performed * * *; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work

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* * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications * * *.

PROVISIONS OF THE CONTRACT INVOLVED

Article 17 of the contract involved (No. W-321-eng-261) reads as follows:

> Article 17. Rate of wages. (In accordance with the act of August 30, 1935, 49 Stat. 1011 (U.S. Code, title 40, sections 276a and 276a-1), this article shall apply if the contract is in excess of $2000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia.)
>
> (a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work * * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, * * *.
>
> (b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there

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has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.[1]

Section 1-31 of the specifications furnished bidders and made part of the contract (Article 1, R. 6) provided:

1-31. *Wage and Labor Provisions.—(a)* The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

Designation	Wage rate, hourly
Carpenters, journeymen	$1.00
* * * * *	*
Laborers, unskilled	0.50
Laborers, concrete puddlers ...	0.50

Paragraph 1-12 of the Standard Government Form of Invitation for Bids provided in pertinent part as follows:

Investigation of Conditions.—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution

[1] Article 17 is set out in the Standard Construction Contract, U. S. Standard Form No. 23-Rev., reproduced in the Appendix to Title 41 U.S.C.A., § 54.13, p. 235.

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> of the proposed contract, including local conditions, availability of labor, uncertainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site * * *. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work.

STATEMENT

On January 31, 1941, on the request of the Corps of Engineers, the Secretary of Labor furnished a schedule of minimum wages for inclusion in the contract specifications for a flood protection project along the north bank of the Chemung River, within the limits of the City of Elmira, New York.[2] The schedule set the minimum hourly wage for carpenters at $1.00 per hour and for unskilled labor at $.50 per hour. Pursuant to the Davis-Bacon Act (*supra*, pp. 2-3), this schedule was included in the specifications furnished to respondent (a corporation with its principal place of business in Binghamton, New York) prior to the computation of its bid on the flood protection project. In response to invitations for bids issued by the Corps of Engineers on March 29, 1941, respondent submitted a bid, based upon a unit price ap-

[2] The work to be done consisted primarily in the construction of levee embankments and new concrete walls; raising an existing wall; and construction of sewers, culverts, drains, and manholes (R. 9).

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plied to the various operations involved in the performance of the work, in the amount of $232,669.30. The Government accepted respondent's bid on May 14, 1941. The specifications were made part of the written contract, No. W-321-eng-261, dated May 14, 1941, and approved June 3, 1941 (Art. 1, R. 5-8), which required the contractor to pay all mechanics and laborers "wage rates not less than those stated in the specifications" (Art. 17, R. 7). *Supra*, pp. 3-4. On June 5, 1941, respondent received formal notice to proceed with the work (R. 42).

Theretofore, on October 22, 1940, the Elmira business agent of the carpenters' local union had informed the United States Engineer's Office in Binghamton that the wage scale for carpenters would be increased from $1.00 per hour to $1.125 per hour as of January 1, 1941 (R. 43). On October 29, 1940, receipt of the letter was acknowledged (R. 43).

On March 4, 1941, some three weeks prior to the issuance of the invitation for bids on the Chemung River flood protection project of the Corps of Engineers, the Secretary of Labor had furnished another government agency, the Public Buildings Administration of the Federal Works Agency, "a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira" (R. 44). That schedule showed the prevailing hourly rates on that type of project for journeymen carpenters as $1.125 and for unskilled laborers as $.55.

Although not required to employ exclusively

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union labor on the flood protection project, respondent did so, and on June 3, 1941, when it began work on the site it paid $.625 per hour for laborers and $1.125 per hour for carpenters. The union had put the carpenter wage rate in effect on January 1, 1941, and the laborer wage rate on April 1, 1941.

On June 16, 1941, respondent advised the District Engineer (who was also the contracting officer) that the minimum wage rates provided in the contract specifications for the flood protection project were less than the rates currently prevailing in the Elmira locality (R. 44). When relief was withheld by the District Engineer, respondent protested to the Chief of Engineers who denied the appeal and disclaimed authority to question the correctness of any determination made by the Secretary of Labor (R. 44). In response to an application for reconsideration, respondent received a reply from the Chief of Engineers reading in part as follows (R. 45):

> A determination as to the accuracy of the specified wages is not necessary to a decision in this case. The contract by Article 17 and by paragraph 1-31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract.

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> No reason has been shown which would warrant modification of the previous decision dated August 5, 1941.

Respondent thereupon brought suit in the Court of Claims on various items,[3] *inter alia* for $15,597.38, the difference in cost between $1.00 and $1.125 (in wages for carpenters) and between $.50 and $.625 (in wages for unskilled laborers and concrete puddlers). The Court of Claims specifically found that "If plaintiff's president had investigated wage rates, he could have ascertained that the prevailing rate for carpenters was $1.125 per hour, and that the prevailing rate for unskilled labor was $.55 per hour, with an advance to $.625 per hour effective as of April 1, 1941" (R. 45). Nevertheless, it allowed respondent a recovery of $7,363.22, on the ground that when the Corps of Engineers represented in the invitation for bids and in the contract specifications that the Secretary of Labor had determined the prevailing wage rates to be $.50 and $1.00, this was a positive misrepresentation of the Secretary's latest determination, upon which respondent was entitled to rely. It was "a representation of the wages it would have to pay when the work was to be done" (R. 68).[4]

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[3] The Court of Claims denied respondent recovery in respect of the claims other than the one here involved. That part of the court's judgment is the subject of respondent's petition for a writ of certiorari in No. 78, this Term.

[4] The recovery did not include the claim for the difference between $.55 and $.625, which was the increase obtained by the union for unskilled labor on April 1, 1941, because it was not shown that the District Engineer knew or should have known

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SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the Secretary of Labor's determination, required by the Davis-Bacon Act, of minimum wage rates to be paid for work upon a government construction contract, constitutes a representation to a successful bidder that labor could be procured in the community at the rates determined by the Secretary.

2. In holding that the incorporation of such a determination in a contract, which incorporation was required by the Davis-Bacon Act, was a representation by the United States that the successful bidder could obtain labor at the rates set forth in the contract.

3. In holding that the failure of the specification of minimum wage rates to reflect increased union wage rates constituted a misrepresentation to the successful bidder.

4. In holding that the determination of minimum wage rates and incorporation in the contract of the specification reciting those rates was a representation upon which the successful bidder was entitled to rely.

5. In holding that the Secretary of Labor made a "superseding" wage determination in this case.

6. In holding that the successful bidder was not estopped to claim misrepresentation where it had willfully neglected to inform itself as to the rate at which local labor could be procured.

7. In entering judgment for respondent.

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of the increase nor that the Secretary of Labor had made a wage determination recognizing this rate prior to the acceptance of respondent's bid (R. 68-69).

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SUMMARY OF ARGUMENT

I

The decision of the Court of Claims is based upon a misconception of the Davis-Bacon Act and the function of Article 17 of the contract, and specification 1-31 incorporated therein (*supra*, pp. 3-4, 5). The Act and the contract provisions are for the benefit of labor and confer no right, but merely place an obligation, upon the contractor. That obligation is simply to pay "not less" than the stipulated minimum wages.

1. The Davis-Bacon Act had for its purpose the placing of a floor under wages to be paid local mechanics and laborers for work performed on government contracts. It required the Secretary of Labor to determine the prevailing wage of each class of labor in each locality where a government contract was to be let and to supply those rates to the procurement agency. In turn, that agency, in its invitation for bids, sets forth the minimum wage rates which the successful contractor would be required to pay. After the acceptance of the bid, the Act provides that the contract require the contractor to pay those *minimum* rates, with certain penalties specified if the contractor fails to do so. The contract and the specification speak of "minimum wage rates" and require the contractor to pay "not less" than those rates. Neither the contract nor the specification undertakes in terms to represent that the contractor would be able to obtain labor at the minimum wage rates set forth in the specification or that wage increases may not occur

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during the course of the performance of the contract. The terms of the contractual provisions are limited to the minimum wages the contractor will have to pay in order to comply with the Davis-Bacon Act.

For that reason, no misrepresentation of facts or conditions can be found in these contractual provisions. The facts stated in the contract and specifications are true. They set forth the applicable minimum wage rates actually determined by the Secretary of Labor. They do not even describe these rates as prevailing rates. Respondent was not advised that it would be able to procure labor for the rates set forth therein or that there would not be increases in wage levels between the time the invitations to bid were drawn up and issued, the bid accepted, the contract signed, or the project completed. On its face, the sole undertaking of the United States was that it would not insist that the contractor pay any more than the minimum wage as specified, irrespective of what increases there might be in the prevailing wage rates at the locale.

2. Nor is there any reason to read into the contract and specification an implied warranty or representation that respondent would be able to procure labor at the specified minimum wages. The Government's purpose is to confer a benefit on the workmen by fixing minima below which the contractor may not go, irrespective of local wage fluctuations. The Government has no concern to protect the contractor against having to pay higher

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wages but only to make certain he does not pay lower wages than those specified. While the statute required the Secretary of Labor to fix the minimum wages on the basis of those prevailing in the locality, the Secretary of Labor does not deal with prospective bidders, makes no representation to them, and could have no interest in the course of the performance of her statutory functions to make representations to such bidders as to what wages the workers might demand. The procurement agency, in turn, had no option but to incorporate the Secretary's determination in the specification and in the contract. The procuring agency merely performs a ministerial function on behalf of the Secretary and the policy of the Davis-Bacon Act to call attention to a "floor" without fixing a "ceiling." To read into the contract, as did the court below, a representation to the contractor that he could obtain the labor for the specified minimum prices has no basis whatsoever, either in the terms or purpose of the Davis-Bacon Act, the language or purpose of the contract and specifications, or in the procedures for establishing minimum wages to be inserted in the contract.

II

Even on the Court of Claims' view that an undisclosed "superseding" wage determination turns the contractual determination into a misrepresentation of the "prevailing wages", the decision below is erroneous. The court seeks to find misrepresentation in the fact that, prior to the issuance of

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the invitation to bid in this case, the Secretary of Labor had made a different and higher determination of the prevailing wages in the local area for carpenters and unskilled labor in respect of a different federal project, which was to be undertaken by another government agency. The Secretary, however, never made a different determination for this particular contract. Accordingly, there was no second determination of minimum wage rates for this project which was withheld from the respondent. As noted before, there was no privity between the Secretary and respondent. She had made no representation to it and was under no obligation to readvise it of any changes which she had found in the prevailing local rate for a different project. Moreover, her determination, which was not subject to judicial review (*Perkins* v. *Lukens Steel Co.*, 310 U. S. 113), could well have been based upon the difference in the degree of skill required of carpenters who construct wooden frames into which concrete is to be poured and carpenters who construct dwellings. It was in respect of the latter that the Secretary made the higher minimum wage determinations.

Nor does the fact that these different rates were known to the procurement agency constitute any basis for a finding of misrepresentation. The contractor was not, and could not, be required to pay the second rates found but only the original contractual rates. The duty of determining the price at which labor could be recruited was under the terms of the contract placed upon the prospective

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bidders and not upon the procurement agency. There is nothing to indicate that the procurement agency knew that respondent was not as fully advised of the prevailing rates in the locality as was the agency or the Secretary of Labor.

III

The contractor is estopped to claim misrepresentation. Under the invitation to bid, it was specifically required to ascertain the difficulties attending the execution of the proposed contract, including local conditions, availability of labor, and other matters. The invitation emphasized that the failure to obtain all available information would not relieve the successful bidder of responsibility for estimating the difficulties or costs of successfully performing the complete work. In bidding upon the contract, respondent implicitly accepted this condition. It must be assumed either to have conducted the necessary local investigation or waived any right to claim excess costs because of conditions which it could have discovered but which, through lack of diligence, it failed to discover. In fact the Court of Claims found that had the president of respondent investigated local conditions he could have readily ascertained that respondent would have been required to have paid higher wages for carpenters and unskilled labor than those set forth in the specification. This he neglected to do, relying upon his belief that the Secretary of Labor always fixed the rates at too high a figure and that there could not possibly be any

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difficulty in recruiting labor at the minima which the contract fixed.

Like other conditions of the contract, the United States has contracted and paid for this condition. Respondent cannot now be heard to claim that its increased labor costs resulted from governmental misrepresentation when, in truth and in fact, it resulted from it's own failure to perform an obligation which the contract placed upon it and which it, at least inferentially, agreed to perform.

ARGUMENT

I

The Schedule of Minimum Wage Rates Specified in a Government Construction Contract, Pursuant to the Davis-Bacon Act, Is Not a Representation to the Successful Bidder of the Wages it Will Have To Pay

The Court of Claims has held that the provisions of a government construction contract, which require that a contractor pay laborers on the contract project not less than the minimum wages set forth in a specification incorporated in the contract, is a representation by the United States that the contractor will be able to obtain laborers at these minimum rates. This interpretation of the standard building contract provisions for minimum wages, required by the Davis-Bacon Act, misconceives its history, terms and scope, and imposes a wholly unjustified burden upon the Government. The determination by the Secretary of Labor of the minimum wage which the contractor must pay, made to satisfy the policy of the Davis-Bacon Act

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and protect workers against substandard wages, does not reasonably imply or even intimate that the contractor will not have to pay more.

1. It is indisputable that the motivation for the Davis-Bacon Act was to benefit workers in the construction field. It required the inclusion in government building contracts of *minimum* wage schedules which the contractor would be required to pay and this requirement was for the limited legislative purpose of putting a floor under wages and thereby protecting workers against substandard earnings. *United States* v. *Morley Const. Co.*, 98 F. 2d 781, 788 (C.A. 2), certiorari denied, 305 U.S. 651; *Gillioz* v. *Webb*, 99 F. 2d 585 (C.A. 5); *Winn-Senter Construction Co.* v. *United States*, 110 C. Cls. 34, 61; 74 Cong. Rec. 6505, *et seq.*; 79 Cong. Rec. 12073; House Rep. 1756, 74th Cong., 1st Sess., p. 1; Sen. Rep. 1155, 74th Cong., 1st Sess., p. 1; Sen. Rep. 1445, 71st Cong., 3d Sess.; *cf. Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507.[5]

With that end in view, the Davis-Bacon Act specifically requires the inclusion in the advertised specifications, and in the contract, of the "*minimum*" wage rates determined by the Secretary of Labor, and provides that the contractor stipulate to pay "*not less*" than the wage rates stated in the advertised specifications. *Supra*, pp. 2-3. No reason has been suggested here or in the court below

[5] In the *Endicott Johnson* case, it was said that the purpose of the related Walsh-Healey Public Contracts Act "is to use the leverage of the Government's immense purchasing power to raise labor standards."

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why the specifications should have gone beyond the statutory requirement, since a representation of the actual wages the employees would demand and receive was not necessary for the particular work, was not contemplated by the Act, and would promote no public policy declared by the Congress.

The terms of the particular contract bear out the reading that protection of the builder's employees from substandard wages is the sole purpose of its minimum wage stipulations. Article 17(a) (*supra*, p. 3) requires respondent to pay wages "computed at wage rates *not less* than those stated in the specifications" (emphasis added). Specification 1-31 (*supra*, p. 4) declares that the Secretary of Labor has determined that certain *minimum* wage rates are to be "applicable in the locality" of the work, enumerates twenty-six classes of employees and the *minimum* wage rates applicable to each class, and then provides that in accordance with Article 17 of the contract "employees at the site shall be paid *not less* than these wages" (emphasis added).[6] On its face, Specification 1-31 was plainly not intended as a representation and was not phrased as one, but in terms imposes an ob-

[6] The specification states that "In accordance with Article 17 of the contract, employees at the site shall be paid *not less* than these wages as listed below" (emphasis added). In contrast, in *Irwin & Leighton* v. *United States*, 115 C. Cls. 18, 23, 33, where the Court of Claims held there was no misrepresentation by the Government, in *Sunswick Corporation* v. *United States*, 109 C. Cls. 772, 776, 803, and in *Winn-Senter Construction Co.* v. *United States*, 110 C. Cls. 34, 39, the specifications read that "The wages *to be paid* laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing * * * *are as follows* * * *" (emphasis added).

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ligation on the contractor. Article 17(b) (*supra*, pp. 3-4) gives the Government the right to terminate the work if the contractor pays *less* than the required wages. The contract does not refer either in Article 17, in the specifications, or elsewhere, to "prevailing wages", but speaks only of "minimum wage rates" and "wage rates not less than those stated in the specifications." The Act itself, as we have noted, envisages the possibility that the builder may have to pay higher wages, when it requires payment at rates *not less* than those stated in the advertised specifications.

2. We would have thought that consideration of these provisions of the Act and the contract should summarily end the matter, but respondent's contention that "the representation was made that the Secretary of Labor had determined the prevailing wage rates in the locality * * *" (R. 2, 37) was nevertheless accepted by the court below, which took the view that the Secretary's determination, "so far as plaintiff's rights are concerned," "amounted to a determination of the prevailing wage," and "a positive representation * * * from the consequences of which the defendant cannot be relieved" (R. 68).

But it is clear, as we have already suggested, that, as a matter of plain language, there cannot be said to have been any misrepresentation. In the context of Article 17, which specifically refers to the Davis-Bacon Act, Specification 1-31 (*supra*, p. 4) stated only the objective and true fact that the Secretary of Labor had determined that the contractor would have to pay carpenters $1.00 an hour

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and unskilled laborers $.50 an hour in order to comply with the minimum wage statute. The Secretary of Labor had made a determination of the applicable minimum wage rates for the purposes of the Davis-Bacon Act, and the rates set forth in the specifications were those determined by the Secretary for that purpose. As we have noted, the contract and specifications call the specified rates the "minimum" and simply require the contractor to pay "not less" than those wages.[7] The term "prevailing wages" is not used in the contract or specification, and so there is no statement or representation that the minimum rates were in fact the prevailing rates. Had respondent been able to procure the required labor at the rates of pay set forth in the contract, it would have complied with the contract requirements irrespective of what rates the local union demanded or what rates were actually "prevailing" in that area. Under the terms of the contract, as long as the Government abides by the determination, does not insist on payment of an intervening increase, does not withhold moneys from the contractor nor terminate the right to proceed because of failure to pay the specified wages (40 U.S.C. 276a, 276a-1), the contractor has nothing to challenge, and there is nothing on which he is entitled to rely. In a word, nowhere

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[7] A specification of minimum wages required by statute to be included in a contract as a measure of the builder's obligation is scarcely the place one would look for a warranty for the benefit of the builder. The court below nevertheless erroneously converted a measure of the builder's obligation into a contractual undertaking on the part of the Government for the builder's benefit.

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within the four corners of the contract is there an express representation or warranty running to the contractor that the minimum wage is the maximum or the only wage that will have to be paid, or even a textual hint of such a representation or warranty. [8]

3. Nor can a warranty that higher wages would not have to be paid be rationally implied from either the Act or the contract. All the relevant cases and legislative materials, as well as the terms of the Davis-Bacon Act and of the contractual stipulations involved here (*supra*, pp. 2-4, 16-20), demonstrate that the Government's concern was the protection and benefit of the employees; the Government was not concerned to protect the contractor against paying higher wages nor to guarantee that sufficient employees could be hired at the established minimum. As in all normal construction agreements, the contractors, "by making their contracts, agreed to pay whatever wages they had to pay to get the labor necessary to do the job." *Winn-Senter Constr. Co.* v. *United States*, 110 C. Cls. 34, 61.

The actual mechanism for determining the minimum wages supports this conclusion that there

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[8] As this Court said in *MacArthur Bros. Co.* v. *United States*, 258 U.S. 6, 11-12, the cases "all declare the principle that the Government will be liable in the same circumstances that private individuals would be liable, but necessarily, neither is liable if neither makes representations."

In the pertinent findings (Fdgs. 5-17, R. 42-46), the Court of Claims has significantly failed to find that the respondent relied on the wage schedule as a representation of the wages it would have to pay. The opinion, however, states that respondent computed its bid in reliance on the schedule (R. 67). *Cf. United States* v. *Esnault-Pelterie*, 299 U.S. 201, 205; *United States* v. *Causby*, 328 U.S. 256, 267-268, and see *infra*, p. 26.

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was no purpose to protect or guarantee the contractor, and therefore no reason to imply a representation or guarantee. The Secretary of Labor, who made the determination, was not in privity with respondent and could have no interest in inducing it to rely on any representation as to the wages that workers might demand. The contracting officer, who in turn was without authority to fix minimum wage rates, had no option under the Davis-Bacon Act but to incorporate the Secretary's determination in the specifications and contract. Thus, the wage-determining agency plainly had no aim to guarantee the respondent, and the procurement agency merely acted, under the statute, as a ministerial conduit for passing on the Secretary's minimum-wage determinations and incorporating them into the contract and specifications.

It is true that the Davis-Bacon Act does require the Secretary to base the contractual minima on the wages "prevailing" in the locality (*supra*, p. 2), and it is on this statutory requirement that the Court of Claims mainly pins its conclusion that, since the prevailing rates were found to be actually higher, the wage schedule in this case was misrepresented. But a statement or declaration by one party, made for a limited purpose, is not a misrepresentation in other contexts if the second party is not entitled to rely on it for the other purposes.[9] As we have shown, it is plain, both from the terms and aims of the Davis-Bacon Act and

[9] We point out above (*supra*, pp. 17-18, 18-19) that neither the contract nor the specifications refer to "prevailing wages," but speak of "minimum wage rates" and require the payment of wages "not less" than those determined by the Secretary.

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from the wording and purpose of the contract provisions, that the Secretary made her determination of minimum wages solely to protect the workers and to fulfill the demands of the minimum wage law, and not for the benefit of the contractor by giving it information as to the wages at which it could attract workers. Indeed, the Secretary had no authority to determine "prevailing" or minimum wages for any end not related to her protective functions under the Davis-Bacon Act. Accordingly, the determination of the minimum wage rates, being solely for the benefit of the labor to be employed, was not one upon which the contractor was entitled to rely and conferred no right of action upon the contractor, irrespective of any error therein. *Cf. Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127.

Moreover, as a practical matter, bidders know in advance that the Secretary's determination can be, at best, only an approximation.[10] They know, for example, that the interval between a request for a wage determination, on the one hand, and the issuance of the Secretary's determination on the other, is usually two or three months. Obviously, the minimum wages specified in the contract were not determined the very day the invitation to bid was issued. In these circumstances, both

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[10] The procedure and sources for the predetermination of rates of wages, described in Title 29, C.F.R., Subtitle A, Part 1, Secs. 1.1-1.20, show the inevitability of differences of opinion. The Secretary is under constant pressure from contractors not to fix prevailing wages too high. *Cf. Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

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parties can foresee that changes may occur [11] and it is reasonable to assume that the Government did not insure against an increase in wage levels between the time the determination is made and the time (i) invitations to bid are drawn up and are issued, (ii) the bids are filed, (iii) the successful bidder is notified that he has been awarded the contract, and (iv) work on the project is begun. A statement of the minimum wage the contractor must pay is certainly not a representation to it that the facts justified no other determination nor that the minimum wages in the specifications had been pinpointed in advance at precisely the level that would obtain at the time the invitations for bids are issued and the work on the project is begun.

In sum, there is nothing in the terms of the Davis-Bacon Act or the contract which sets forth any specific warranty or representation as to the

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[11] See Title 29, C.F.R., Subtitle A, Part 5, Sec. 5.4. Section 5.4, 16 F.R. 4430, effective July 1, 1951, provides that if a contract for which a wage determination is sought is not awarded within 90 days of the original determination, it is obsolete and a new determination should be requested.

Under the 1935 amendment, the Secretary writes the prevailing rate of wages into the contract in advance rather than after a dispute has arisen, as under the 1931 Act. *Gillioz* v. *Webb*, 99 F. 2d 585, 587 (C.A. 5); *Gilbert Engineering Co.* v. *United States*, 82 C. Cls. 616, 623; 79 Cong. Rec. 12073.

An amendment to S. 3487, 72d Cong., 1st Sess., in the form originally approved by the Senate, would have had the predetermined wage rates increase or decrease during the performance with a corresponding adjustment in the contract price. H. Rep. 1441, 72d Cong., 1st Sess.; Sen. Rep. 509, 72d Cong., 1st Sess.; 75 Cong. Rec. 8365, 12381-12387. It was defeated in the House because its opponents believed it would introduce cost-plus elements and shift responsibility from the contractor to the Government. 75 Cong. Rec. 12385-12387.

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wages that will have to be paid by the contractor. On the contrary, these terms warn that the specified wage rates are merely minima. And there is nothing in the policy or purpose of the Act, or the procedures for determining minimum wage rates, from which such a warranty or representation can be fairly implied. In finding one, the court below has simply enlarged the Government's obligations beyond those assumed expressly or by fair implication, in the face of the constant admonitions of this Court. *Smoot's Case,* 15 Wall. 36, 45; *cf. Southern Ry. Co.* v. *United States,* 322 U. S. 72, 76-77.

II

No Superseding Wage Determination Was Ever Made

The Government's position is that, for the reasons stated in Point I, no representations as to wage rates were ever made to respondent and that, even if an undisclosed inconsistent determination had been made later, respondent was not entitled at any time to assume that it would not have to pay higher wages than those set forth in Specification 1-31. But the Court of Claims finds special reason to hold the United States in what it misconceives to be a later superseding wage determination which was not disclosed to respondent (R. 68).[12] This error is an additional reason why the judgment below cannot stand.

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[12] The assumption of a superseding determination is vital to the holding below, as is made plain by (a) the statement that "Plaintiff was entitled to rely on it as the Secretary's *latest* determination" (R. 68), (b) the holding that respondent was entitled to recover "the difference between the wages specified

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As shown in the Statement, *supra*, pp. 5-6, the later determination of March 4, 1941 was for entirely different work, a housing project, to be constructed for another agency, the Public Buildings Administration. The Secretary made no new determination for the Engineer's flood protection project, on which respondent was the contractor. There may be different determinations by the Secretary of Labor for different projects in the same city. The Davis-Bacon Act requires a (pre) determination [13] of wages prevailing on projects of a character similar to the contract work. What is a project of a similar character is for the Secretary of Labor to determine. *Winn-Senter Construction Co.* v. *United States*, 110 C. Cls. 34, 61; *cf. United States* v. *W. S. Barstow & Co.*, 79 F. 2d 496 (C.A. 4).

The contractor asserts that the housing project was similar (R. 38), but the Secretary of Labor never determined that to be the fact, [14] and the contractor's assertion is not self-evident. All

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in the Invitation for Bids * * * and those which the Secretary of Labor determined on March 4, 1941 to be the prevailing wages" (R. 68), and (c) the emphasis in dealing with the additional (unaccepted) claim for misrepresentation that "the evidence does not reveal that the Secretary of Labor made a wage determination recognizing this rate prior to the acceptance of plaintiff's bid" (R. 68). See fn. 17, *infra*, p. 29.

[13] As noted above (pp. 22-23), the statute in requiring the minimum wages to be stated in the advertised specifications plainly requires the determination to be made prior to the issuance of invitations to bid and the acceptance of bids.

[14] The Secretary's wage determination is not subject to judicial review at the contractor's instance. *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 735; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507.

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the Secretary had actually done was to make a determination of wages on a separate *housing* project. The findings below neither justify nor compel the inference that the January 29, 1941, determination for the flood protection project, so far as it went, was superseded in fact, or that the Secretary had so determined. *Cf. Irwin & Leighton* v. *United States,* 115 C. Cls. 18, 41-42. The opinion, which states that at the time of the invitation for bids on March 29, 1941, "the Secretary of Labor had since issued a *new determination* of the prevailing wage rates for Elmira" (R. 66, emphasis added) outstrips the neutral finding that "On March 4, 1941, the Secretary of Labor furnished to the Public Buildings Administration of the Federal Works Agency a schedule of minimum wages in the Elmira area for inclusion in the bidding specifications and contract for a Federal Housing Project in Elmira, New York" (R. 44) (if, as seems the clear purport, by "new determination" or "redetermination" (R. 67) the opinion means a superseding determination for a similar project). It is settled, however, that the opinion cannot supply critical defects in the findings. *Cf. United States* v. *Esnault-Pelterie,* 299 U.S. 201, 205; *United States* v. *Causby,* 328 U.S. 256, 267-268. And there is no *a priori* ground for assuming an identity between the projects. Building houses may well call for higher attainments and skills, and be more exacting, than erecting and placing the wooden forms or supports to hold the concrete poured for the walls and embankments of flood protection projects.

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There is sound reason for insisting that no subsequent determination be held to be "superseding" unless it indisputably appears that the later determination is actually for the same project. Since every determination under the Davis-Bacon Act is of necessity made for a specific project, it would be intolerable to require a contracting officer to inform himself of every other determination, made for other agencies and other projects, and to modify the specifications on his own judgment as to whether another determination might be applicable or refer the question back to the Secretary of Labor for further action. Such a procedure would make it exceedingly difficult for specifications to be completed or contracts to be awarded in areas in which there might be numerous government projects under way at any given time, particularly in periods of rapid upward wage movements.[15] This is particularly true where as here

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[15] It should be noted that in denying the claim for the additional increase obtained by the union for unskilled laborers on April 1, 1941, two days after the invitation for bids had issued, the Court of Claims did not dismiss it out of hand but only because it was not shown (1) that the District Engineer knew or should have known of the increase at the time the contract was awarded, and (2) that the Secretary made a wage determination recognizing the increase prior to the acceptance of the bid (R. 68-69). Thus, even if the specifications met the court's rigid standards when the invitation issued, the court has implicitly held that they might become misrepresentations overnight. The court below has held that respondent was entitled to rely on the minimum wage schedule "as the Secretary's latest determination—as a representation of the wages it would have to pay when the work was to be done" (R. 68).

In any event, assuming respondent relied on the minimum wages in the specification *in computing its bid* (see *supra*, p. 20, fn. 8), this reliance could not have been carried forward to the acceptance of the bid on May 14, 1941, and the commence-

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the specification deals with large numbers of different classifications of labor with varying minimum rates. The clearest showing must be required to substantiate a claim of a "superseding" determination for the same project. [16]

Since the record shows no "superseding" determination for the particular project involved here, the whole misrepresentation hypothesis—apparently based by the Court of Claims on the subsequent determination in March 1941 (see fn. 12, *supra*, pp. 24-25)—falls of its own weight. The contracting officer's failure to ascertain, before inviting bids, whether or not the Secretary of Labor had made a new determination of "prevailing wage rates" after the determination of January 29, 1941, loses all significance if no redetermination had in fact ever been made for this project. The January 29, 1941 determination would still be the latest de-

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ment of the work, as to increases after the March 29, 1941, invitations to bid. The project was not completed until December 1942 (R. 67). See *supra*, pp. 22-23.

[16] The discussion in the text shows why this case cannot be forced into the mold of *Albert & Harrison, Inc.* v. *United States*, 107 C. Cls. 292, certiorari denied, 331 U.S. 810, relied on below (R. 68). For the reasons stated in Point I, we believe that the *Albert & Harrison* decision was erroneous, but it is significant, in any event, that the alleged misrepresentation there involved was as to the wage rate the Secretary of Labor had fixed on April 4, 1941, *a week before the invitation to bid was issued*, for the very same general project. The bricklayers demanded the prevailing rate as determined in April 1941 by the Secretary of Labor for the same Raritan Arsenal, instead of rates determined October 26, 1940 (which had been incorporated in the contract); the contracting officer, although actually aware of the higher rate for the Arsenal, and better informed than the contractor, withheld the information from the contractor. See *A. J. Paretta Co.* v. *United States*, 109 C. Cls. 324, 349, certiorari denied, 333 U.S. 832.

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termination, and the only one applicable to the flood protection project. [17]

III

Respondent Is Estopped By Its Contract from Claiming Reliance on a Misrepresentation

Respondent secured acceptance of its bid on the strength of the assurances it gave the Government that, regardless of whether it inspected labor conditions and the availability of labor, it agreed to be bound by what an inspection would reveal and assumed the risk of an upturn in wages. [18] This suit repudiates these assurances by the contractor, [19] and the decision below denies the Govern-

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[17] We believe that the opinion below rests squarely on the supposed redetermination of March 4, 1941, to establish a misrepresentation. See fn. 12, *supra*, pp. 24-25. But the opinion is not absolutely clear and the court may have redetermined the prevailing wages for itself. If the court did reject the Secretary's wage determination as incorrect, it in effect subjected the administrative finding to judicial review, at the contractor's instance, contrary to the settled rule. *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 735; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507. There is not the slightest warrant in the Davis-Bacon Act or in the contract for a redetermination of wages by the court.

[18] Paragraph 1-12 of the Invitation for Bids (*supra*, pp. 4-5) calls upon bidders to ascertain for themselves "the difficulties attending the execution of the proposed contract, including local conditions, availability of labor * * *." It emphasizes that failure to obtain "all available information concerning" local "conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work." Of course, "the availability of labor," of which the bidders were to make their own estimates, is directly related to the wage level.

[19] The court below states that "Prior to the submission of its bid, [respondent] did not attempt to make an independent investigation of the prevailing wage scale * * * but it computed its bid in reliance upon the schedule of minimum wage

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ment the benefit of its bargain by shifting the risk of higher wages from the builder who agreed to bear it to the United States, which specified that the builder assume it.

To permit a contractor to capitalize at the expense of the United States on its own neglect of its duties conflicts with the consistent procurement policy of the Government. That policy has endeavored to prevent reliance by a contractor on assumptions as to prevailing conditions, rather than its taking direct responsibility, making its own diligent investigations and appraisals, and exercising its independent business judgment. The policy is reflected in disclaimer provisions and in provisions which require contractor self-reliance and charge the contractor with the knowledge it would have obtained by investigating on its own account.[20] The "repellent effect" of these provisions on a claim of misrepresentation has been noted by this Court. *MacArthur Bros. Co.* v. *United States*, 258 U.S. 6, 10. Given proper weight, they impose a duty on the contractor to investigate,

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rates contained in the specifications furnished" (R. 67). This clearly states respondent's failure to investigate and predicates respondent's reliance "upon the schedule of *minimum* wage rates contained in the specifications furnished."

Respondent admits the truth of this statement;—"* * * it is true,—and the Court has so found,—that Respondent made no independent investigation of prevailing wage rates, prior to bidding for the contract * * *" (Resp. Br. in Opp., p. 14).

[20] See *Maguire & Co.* v. *United States*, 273 U.S. 67; *MacArthur Bros. Co.* v. *United States*, 258 U.S. 6; *United States* v. *Silverton*, 200 F. 2d 824, 827 (C.A. 1).

These provisions serve a useful purpose and are not against public policy even in private contracts. *Abrams, Inc.* v. *Wolkov*, 371 Pa. 44.

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a violation of which precludes reasonable reliance on alleged representations. The contractor may not profit by its own wrong to put the onus on the Government (*cf. Goess* v. *Ehret,* 85 F. 2d 109 (C.A. 2)), and thereby defeat the contractual intention that it depend on its own exertions instead of retaining an anchor to windward in the form of its own subjective and undisclosed understanding of the Government's statements.

Information as to wage rates was readily available to respondent, a local contractor,[21] and the Court of Claims expressly found that "If plaintiff's president had investigated wage rates, he could have ascertained" the true prevailing rates and the wages upon which the union would insist (R. 45).[22] Failure to investigate is not palliated by the assertion (Resp. Br. in Opp., p. 14) that the president's experience in bidding for Government contracts was that "invariably the wage rates incorporated in said contracts were equal to and sometimes higher, but never lower, than those that actually prevailed in the contract areas." This statement merely emphasizes that, rather than investigate as required, respondent chose to rely on its president's guess. This was a calculated risk on the part of respondent, and it should not be now heard to say that it was misled by the Government rather than by its own agent.

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[21] Binghamton is less than sixty miles from Elmira. It was in Binghamton that the United States Engineers Office was located (*supra,* p. 6).

[22] The contract did not expressly or impliedly require the contractor to supply union labor. See *supra,* pp. 3-4, 6-7.

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In these circumstances, the decision below is harmful to the Government's procurement policy in two separate ways. As noted above, it reads out of the contract the contractor's specific assurances that it agrees to be bound by what an inspection would disclose. *Cf. Wells Bros. Co.* v. *United States,* 254 U.S. 83, 87. The contractor is relieved of the risk of ascertaining wages which a contractual stipulation imposes on it, and which it probably would have to bear even in the absence of a disclaimer provision. [23]

The decision below also is damaging to the Government's procurement policy in another aspect. All bidders are intended to be on a parity, without advantages to bidders who neglect to investigate. By an increase in the contract price after completion of the work, the Court of Claims, on the basis of a judicial redetermination of prevailing wages, confers an unfair preference on contractors who neglect to do their own investigating—as the contract requires—over diligent bidders who do investigate and who anticipate the possibility of higher wage levels in making their bids. This puts a premium on a failure to investigate, both in ascertaining the successful bidder and in computing the total contract price. Thus, should the Government be compelled to reimburse respondent for its own failure and in disregard of its contractual undertakings, it may well be that the cost of perform-

[23] *Slaughter's Administrator* v. *Gerson,* 13 Wall. 379; *Andrus* v. *St. Louis Smelting & Refining Co.,* 130 U.S. 643, 647; *Farnsworth* v. *Duffner,* 142 U.S. 43; *Clark* v. *Reeder,* 158 U.S. 505, 524.

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ance under some other bid, which had been carefully prepared, would have been the low one and would have been accepted. The very purpose of the disclaimer provision was to make sure that the Government should not be required to suffer damage of this kind in order to relieve a negligent bidder.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

ROBERT L. STERN,
Acting Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
HUBERT H. MARGOLIES,
Attorneys.

NOVEMBER, 1953.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 65

THE UNITED STATES,
Petitioner,

vs.

BINGHAMTON CONSTRUCTION CO. INC.

No. 78

BINGHAMTON CONSTRUCTION CO. INC.,
Petitioner,

vs.

THE UNITED STATES.

BRIEF OF THE BINGHAMTON CONSTRUCTION CO. INC.

JEROME BEAUDRIAS,
Attorney for Binghamton Construction Co. Inc., Petitioner in above entitled proceeding No. 78, and Respondent in above entitled and concurrent proceeding No. 65,
Office & P. O. Address,
83-85 Warburton Ave.,
Yonkers 2, New York.

MALCOLM A. MACINTYRE,
Of Counsel for Binghamton Construction Co. Inc., in both proceedings, and a member of the Bar admitted to practice before the Supreme Court of the United States,
20 Exchange Place,
New York, New York.

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BINGHAMTON CONSTRUCTION CO. INC.,

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THE UNITED STATES.

BRIEF OF THE BINGHAMTON CONSTRUCTION CO. INC.

A. As Petitioner—In Support of the Issues Sought to Be Reviewed In Proceeding No. 78.

I.

The minimum wage schedule of the subject contract was void ab initio, because of respondent's failure to comply with the provisions of the "Davis-Bacon Act" and the "Labor Department's Regulation 503", for the predetermination of prevailing wage rates.

In substantiation of said charge, the attention of the Court is respectfully called to the following uncontroverted facts,—

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1. No preliminary Field Investigation and Report of the wage rates prevailing in the Contract area, was made by a duly appointed and qualified referee, as directed by *Regulation 503, Sections 4 and 5 (a)*. Instead, the Wage Schedule incorporated in the subject Contract was predicated upon an alleged field investigation by the *Contracting Officer* (Testimony, pgs 700-708), who admittedly had no authority to perform said duty (Testimony, pg 708) with which the Secretary of Labor is specifically charged by the *Davis-Bacon Act*, and who very certainly was not one of those designated by *Regulation 503, Section 5(a)* as qualified to engage in the predetermination of prevailing wage rates.

2. In addition to the technical objection that he was not qualified to act,—the Contracting Officer's report of his investigation (Deft's Exhibit 1, enclosure 5) clearly shows that he made no attempt to conduct his investigation in the manner and with the thoroughness directed by *Regulation 503*, and more particularly, that he neglected to hold the Public Hearing directed by *Sections 11 to 19* inclusive of said Regulation.

3. Moreover, even the inadequate evidence of prevailing wage rates incorporated in the Contracting Officer's said report, became suspect when, upon the trial of this action, James F. Doughty, Business Representative of both the *Carpenters Union, Local 532 of Elmira* (Testimony, pg 425) and of the *Elmira Building and Construction Trades Council* (Testimony, pg 402) when said field investigation was allegedly made,—and also Henry W. Streeter, a prominent Elmira contractor, by affidavits (attached to Pltf's Exhibit 11) and by their sworn testimony, *categorically denied* that they had either held the conferences, or expressed the opinions re prevailing wage rates, that were reported by the Contracting Officer

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(Testimony, Doughty, pgs 437-438 and 443; Streeter, pgs 563-564).

4. The Secretary of Labor acknowledged the inadequacy and illegality of said Wage Determination of January 31, 1941, incorporated in Petitioner's Contract when, on March 4, 1941, on issuing a new wage determination for the Contract area (Pltf's Exhibit 27) she stated in the second paragraph thereof, that her action was taken because the prevailing wage rates for the Elmira area "have not been determined recently *under the Act*" (emphasis added).

II.

Having ruled that the wage rate of 50¢ per hour for common labor shown by the erroneous Contract Wage Schedule, was a misrepresentation for which Petitioner could recover damages,—the Court below erred in awarding less than one half of the damages caused by said misrepresentation.

The Court below awarded Petitioner the difference between the erroneous rate of 50¢ per hour for Common Labor set forth in the Contract Wage Schedule, and the rate of 55¢ per hour found to be prevailing by the Wage Determination of March 4, 1941 (R. 68), upon the premise that on March 29, 1941, when the Contracting Officer advertised for bids on the subject Contract, he knew or should have known, of the Wage Determination of March 4th, and his failure to correct the Contract Wage Schedule to conform to same, constituted a misrepresentation of the true facts (R. 68).

The Court also found, that on and after April 1, 1941, the prevailing wage rate for Common Labor advanced

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to 62.5¢ per hour, and that Petitioner was obliged to pay said increased rate when it started to perform the Contract on June 3, 1941 (R. 44, Finding 11).

However, despite said finding, the Court refused to award Petitioner the additional damages caused by said rate increase from 55¢ per hour to 62.5¢ per hour, stating as its reason for said refusal that,——

> "* * * it is impossible to determine whether the District Engineer knew or should have known of its existence (i.e., the increase in rate to 62.5¢) at the time he awarded this contract to plaintiff." (R. 68)

We respectfully submit that the following facts disclose the Court's error in so ruling,——

1. Since,—as the Court ruled,—the District Engineer was chargeable with knowledge of the Wage Determination of March 4, 1941, fixing the Common Labor rate at 55¢ per hour, *he was also chargeable with the knowledge* that in said Wage Determination the Secretary of Labor specifically ruled that,——

> "*These rates are to be considered prevailing for ninety days from the date of this decision* (March 4, 1941), unless the decision is changed *prior* to the expiration of that period for contracts unawarded at that time." (Pltf's Exhibit 27) (emphasis added)

Said maximum period of ninety (90) days expired on *June 2, 1941,* and therefore, when Petitioner was awarded the Contract *on May 14, 1941* (R. 42, Finding 2) by the District Engineer—*subject to the approval of his superiors*—the District Engineer knew, or should have known, that *71 days* of said 90-day period had already

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expired, and that it would take the remaining 19 days to have the proposed award of the Contract to Petitioner duly ratified.

Therefore, on June 3, 1941, when the Contract became binding upon the parties, through the endorsement thereof by the Division Engineer (R. 8 & R. 42, Finding 2) the Contracting Officer knew, or should have known, that *the Secretary of Labor's latest Wage Determination for the Contract Area, had lapsed the previous day.*

Certainly at that time—if not earlier—a due compliance with the letter and intent of the *Davis-Bacon Act,* required that the Contracting Officer apply to the Secretary of Labor for a new wage determination. Had he done so, the Labor Department's resulting investigation would have disclosed the 62.5¢ hourly rate prevailing for Common Labor and Petitioner's loss and resulting claim for damages need never have occurred.

We respectfully submit that the violation of the statute disclosed by the foregoing undisputed facts, should alone be sufficient to justify Petitioner's claim.

2. That the Contracting Officer had personal knowledge,—long before April 1, 1941,—of the Common Labor wage rate increase to 62.5¢ per hour that occurred on that date, is disclosed by the following evidence,——

a. The Contracting Officer's signed Report to the Labor Department, of wage rates prevailing in the Contract area (Deft's Exhibit 1, enclosure 5), *dated January 10, 1941,* contains the following statement,——

> "* * *. The union states it is contemplating a new rate of $0.625 per hr. to be effective April 1, 1941. * * *"

b. Also, Petitioner's witness, James F. Doughty, who in 1940 and 1941, was Business Representative of the

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Elmira Building and Construction Trades Council, testified that on or about November 15, 1940, the Laborers' Local Union No. 1355 of Elmira, N. Y. advised the Contracting Officer by letter, that the wage rate for Common Labor would be increased to 62.5¢ per hour, effective April 1, 1941 (Testimony, pgs 428-429 and 431).

III.

In denying Petitioner's claim to an unpaid balance of $13,904.21 for Sheeting and Shoring installed under Contract Item No. 7 for the protection of six specific structures adjacent to the contract—the Court below erred in the following respects.

1. The Contract provides that the Sheeting and Shoring installed for the protection of said six (6) adjacent structures was to be measured *by the square foot of protected area* (R. 48, Finding 18) and Petitioner was to be paid the unit price of 65¢ for each square foot of area so protected (R. 48, Finding 19).

The parties were in agreement as to the locations where Sheeting and Shoring was installed for the protection of said structures—but differed greatly as to the size of the respective areas protected by said installations (R. 49, Finding 23, 1st par; also Defts. Exhibit 22, subd. B).

Petitioner has at all times freely disclosed the dimensions of length and width used by it in computing the protected areas—aggregating 24,805 square feet—claimed by it with respect to each adjacent structure (R. 50).

The Contracting Officer, however, while willing to disclose the number of square feet of protected area allowed by him for each of the six adjacent structures,—

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and together totaling 3,413.9 square feet (R. 49, Finding 23, 1st par.; also Defts. Exhibit 22, subd. B)—has consistently failed and refused to reveal the actual dimensions of length and width used by him in computing said payment quantities, despite Petitioner's repeated demands for said information, both prior to and at the hearings before the Commissioner.

Petitioner respectfully contends, that where a contractor's compensation is determined by applying the unit prices bid to the quantities of work performed, there is an implied duty on the part of the Contracting Officer to fully disclose the dimensions, field measurements, mathematical computations and methods used by him in computing the quantities allowed to the contractor—and more particularly so if there be any dispute as to the quantity so allowed.

That in the instant case, the Contracting Officer's refusal to reveal said dimensions and computations, constitutes a breach of the contract on the part of the Respondent Government, and such a failure on Respondent's part to justify the allowances made Petitioner, that the Court below was in error in sustaining his wholly inadequate allowance to Petitioner for Sheeting and Shoring installed for the protection of adjacent structures.

2. *The Court below approved the Contracting Officer's use of a formula for measurement of the area protected by Sheeting and Shoring installed to safeguard said adjacent structures, that denied Petitioner any compensation for the major and most costly part of the sheeting and shoring so installed.*

The trench excavated along the north bank of the Chemung River for the footings and foundation of the Flood Control Wall called for by the Contract, extended along—and very close to—the southerly, or river side, of

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each of said structures, and was carried to a depth of from 3 to 5 feet *below the bottom elevations of the foundation walls or footings of each of said structures.*

As Petitioner's trench excavation neared, reached and passed said *bottom elevations* of the abutting structures, it became necessary to substitute for the earth removed, a *Sheeting* of wood planks, placed against the face of the cut nearest to the structure, and held in place by *braces or shores,* of sufficient size and strength to give the *lateral support* necessary to hold immovable, the earth underlying and bearing the weight of each said structure.

Unquestionably, the Contract provisions for measuring and paying for the materials supplied for and the labor performed in placing said Sheeting and Shoring,—to wit, *by computing the square footage of the area protected by same, and paying the unit price of 65¢ per square foot,*—must be deemed ambiguous because of Respondent's failure to include in the Contract, a definition of "protected area".

In allowing to Petitioner for the areas protected, as to all six (6) abutting structures, an aggregate of only 3,413.9 square feet, the Contracting Officer,—while refusing to reveal the dimensions of length and heighth used in computing said aggregate area,—asserted that he had arrived at same——

> "• • • by using the length of the area actually sheeted and (had multiplied same by) the difference in elevation between the top of the sheeting and the *bottom elevation of the adjacent structures.*" (R. 69, see quotation at foot of page) (emphasis added)

However, said *method of measurement* is manifestly in error, since *it excludes all of the Sheeting and Shoring*

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installed in that portion of the trench extending from 3 to 5 feet below the bottom elevations of the abutting structures—and which portion supplied the greater part of the required *lateral support* and was the most costly to install.

We therefore respectfully submit, that in approving the Contracting Officer's said method of computing "protected area" and in rejecting Petitioner's interpretation of same, the Court below is in error,—and has wholly disregarded the rule expounded by this Honorable Court in *The United States* v. *Otis,* 120 U. S. 115; 30 Law Ed. 609, that——

> "• • • doubtful expressed in a contract should be construed strongly against the party who prepared the paper."

IV.

In refusing to award Petitioner the $6,070.19 of additional cost caused by the change in specifications for finishing concrete surfaces,—ordered in October of 1941, for use on concrete to be erected in 1942—the Court of Claims erred in the following respects:

1. The Court below presumably overlooked Article 3 of the subject Contract,—prepared on U. S. Standard Form No. 23—Rev. (R. 5) that in its pertinent portions provides as follows,——

> "ARTICLE 3. *Changes.*—The contracting officer may at any time • • • make changes in the • • • specifications of this contract and within the general scope thereof. If such changes cause an increase • • • in the amount due under this contract, • • • an equitable adjustment shall be made • • • " (Pltf's Exhibit 1, Item 1, p. 3).

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Also, paragraph 1-19, on page 1-14 of the Contract Specifications, that in its pertinent portions provides as follows,——

> "1-19. *Minor Modifications.*—The right is reserved to make such minor changes in the execution of the work to be done under these specifications as, * * * may be necessary or expedient to *carry out the intent of the contract, provided that the unit cost to the contractor of doing the work shall not be increased thereby.* * * * " (Pltf's Exhibit 1, Item 1.) (Emphasis added.)

The new specifications issued by the Contracting Officer on October 29, 1941 (R. 26, Finding 37) entitled "Method of Treating New Concrete Work" (R. 56-58) materially changed the method of treatment of exposed concrete surfaces, from that called for by the original Specifications (R. 53-54, see subdiv. [d] of quoted pp. 7-05 of Specs.), and provided for the use of three (3) materials not required by said original Specifications.

With respect to the concrete walls erected and finished in 1942, to which said new specifications applied, the additional expense that Petitioner is justly entitled to recover is undisputed at $6,070.19 (R. 64-65, Finding 50), which for the 2,782 cubic yards of concrete placed in 1942, meant an increase in the unit cost to Petitioner of $2.18 per cubic yard.

We respectfully submit that under the provisions of Article 3 of the Contract, and paragraph 1-19 of the Specifications, Petitioner is entitled to recover said additional cost, and the Court below should not have rejected said claim.

2. The ruling of the Court below,—that said new finishing specifications were no more than the detailed instruc-

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tions that Petitioner should have anticipated receiving, to supplement the very general directions contained in the original Specifications (R. 72),—is not only unsupported by any evidence, but is flatly contradicted by the testimony given by the Contracting Officer, at the hearings before the Commissioner.

At the hearing of September 21, 1949, General James C. Marshall,—who in 1941 and 1942 was the District Engineer at Binghamton, New York, and Contracting Officer for this Contract,—when called to the witness stand on behalf of Respondent, testified to the adequacy of the original finishing specifications, as follows,——

Testimony page 692:

> "Q. 176 * * * Is it your belief * * * that those specifications (those in the contract) if followed carefully by the average able contractor, will result in a suitable operation? A. Yes, by the average, able, experienced, conscientious contractor, he would have had results that would have been satisfactory."

Furthermore, when counsel for Petitioner read *from the original Contract Specifications,* the instructions as to the steps to be taken in finishing concrete, the District Engineer testified that if said instructions were followed exactly and carefully, the results desired under the Contract would have been achieved (Tr. 662-663; 664-665, Q. 82; 689).

In fact, the general tenor of the Contracting Officer's testimony, and the statements contained in his letters to Petitioner,—of October 20, 1941, complaining of the surfaces of concrete erected in 1941 (R. 55, Finding 38), and of October 29, 1941, forwarding the new specifications, referred to therein as "corrective measures" (Pltf's Exhibit 1, Item 16; and R. 26, Finding 37),—clearly show

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that the new specifications were issued because of his dissatisfaction with the appearance of the surfaces of the concrete erected in 1941 and his determination that the concrete to be erected in 1942 would have a more pleasing appearance.

We respectfully submit that while it might be argued that there was some justification for his issuance of the new specifications labelled "Method of Treating Existing Work" (R. 56), on the claim that the unsatisfactory appearance of the concrete already erected, was the fault of Petitioner,—there could be no justification for the issuance in 1941, of new specifications for finishing concrete not to be erected until 1942,—unless, of course, he was prepared to pay the extra expense involved.

Also, entries in the Contract "Log", or daily diary, kept by the Resident Engineer of the day-to-day happenings on the Contract (in evidence as Defendant's Exhibit 13A), disclose that on October 20-22, 1941, while carrying on concreting operations in accordance with the original Specifications, satisfactory surfaces were obtained on new concrete installed, through enrichment of the "design" or "mix" of the concrete, by increasing the cement content thereof from 5.5 sacks to 5.75 sacks per cubic yard, at an additional cost to the Government of only 15¢ per cubic yard of concrete placed.

The Contracting Officer, however, was unwilling to pay said increased cost, preferring to achieve the desired results by forcing Petitioner to follow the new specifications at an additional cost to Petitioner of $2.18 per cubic yard as aforesaid.

Finally, Petitioner's witnesses Charles H. Sells and William R. Brewster, licensed engineers, and the only disinterested expert witnesses called with respect to this issue, testified that said new specifications for treatment

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of concrete to be erected in 1942, should provide a surface finish not generally required for flood control walls; and that no contractor in bidding for the subject Contract, would have any reason to believe that he would be called upon to perform such work. Both witnesses testified that, in their opinion, the original Contract Specifications were both adequate in sufficient detail for the construction and finishing of the type of concrete wall called for by the subject Contract. (Testimony, Sells, pgs 1115-1116, Q. 75-77; Testimony, Brewster, pg 485, Q. 54, pg 546, Q. 202-203, pgs 466-488, Q. 47, pg 489, Q. 59, pg 491, Q. 63).

Said testimony was confirmed, when there was received in evidence,—as Defendant's Exhibit 18,—a printed pamphlet issued by the Portland Cement Association, wherein the Specifications set forth for the finishing of concrete surfaces of such ornamental structures as public buildings, etc., were found to conform to those that had been issued by the Contracting Officer on October 29, 1941 for finishing the surfaces of the Flood Wall sections to be erected in 1942.

In view of the foregoing facts disclosed by the record, we respectfully submit that the Court below was *not* justified in rejecting Petitioner's said claim,—and its action in so doing should be reviewed by this Honorable Court.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari, should be granted.

* * * * *

B. As Respondent—In Opposition to the Government's Contentions in Proceeding No. 65.

In bidding for the subject Contract, the Respondent did not regard the Minimum Wage Schedule incorporated

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therein, as a warranty that labor could be obtained at the rate specified.

However, Respondent did rely upon the truth of the statement contained in paragraph 1-31 of the Contract Specifications, that,——

> "The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work."

Also, since said Specifications contained no information whatsoever, as to when said determination had been made, the Respondent believed—and had every right to believe—that said determination had been recently made, and when it submitted its bid on April 29, 1941, had no reason to suspect that the Wage Determination incorporated in the subject Contract, had been issued three months earlier.

While it is true,—and the Court has so found,—that Respondent made no independent investigation of prevailing wage rates, prior to bidding for the contract, Respondent's President testified before the Commissioner, that his omission of such an investigation, was due to his experience in bidding for numerous Federal contracts and his discovery that invariably the wage rates incorporated in said contracts were equal to and sometimes higher, but never lower, than those that actually prevailed in the contract areas (testimony, Davis, pgs 7-8, 20-21).

That as a result of said prior experience, it had been deemed unnecessary *to duplicate an investigation with which the Secretary of Labor was specifically charged by statute, and that the Contract positively represented had been made.*

It has repeatedly been held that a contractor was not to be deemed negligent in accepting as true, without in-

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dependent examination, the results incorporated in a contract, of an investigation made by the owner.

> *Hallerbach* v. *United States,* 233 U. S. 165, 172;
> *Christie* v. *United States,* 237 U. S. 234, 242;
> *United States* v. *Spearin,* 248 U. S. 132, 137;
> *United States* v. *Utah Stage Co.,* 199 U. S. 414, 424.

That the Government has generally recognized and acknowledged the existence of this principle, is evidenced by a fact of which this Honorable Court may take judicial notice, to wit,—that shortly following the letting of the subject Contract, the United States Government's Standard Form of Contract and Specifications, similar to that used for the subject Contract, was amended to include the following notice,——

> "The contractor will be expected to make his own investigations and determine for himself the wage rates which may prevail during the period of the contract. Wage rates which may be found to exceed the minimum herein set forth, will not be a basis for claim against the United States for added costs."

In bidding Respondent realized that in a Contract of 19 months duration, wages could not be expected to remain static, and in 1942 Respondent did, in fact, absorb without protest or claim against the Government, an increase of the wage rate for Common Labor, from 62½¢ to 75¢ per hour and an increase in the wage rate for Carpenters, from $1.125 to $1.25 per hour.

However, had the Minimum Wage Scale incorporated in Respondent's Contract, conformed to the wage scales that prevailed in April of 1941 when Respondent's Bid was prepared, Respondent would not have suffered the loss of $15,597.38 sought to be recovered on its wage claim.

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As hereinbefore shown under Point I of this Memorandum, in support of Respondent's concurrent Petition for Certiorari, the principal Contract misrepresentation justifying an award to Respondent was that the provisions of the *Davis-Bacon Act* had been complied with, in preparing the subject Contract for letting when, in fact, there had been so such compliance. As a result, the rates of wages specified with respect to Common Laborers and Carpenters, ***was not true on January 31, 1941,*** when the Wage Determination was issued by the Secretary of Labor.

Furthermore, and with respect to Petitioner's contention that the Wage Determination of March 4, 1941 should have had no bearing on the issues of this action, because same was issued for incorporation in another contract,—the attention of this Honorable Court is respectfully referred to the statement in said Wage Determination, that the rates incorporated therein were to be deemed prevailing in Elmira for a maximum period of ninety (90) days, unless changed prior to the expiration of said maximum period, for contracts still unawarded (Pltf's Exhibit 27).

It is respectfully submitted, that the Contracting Officer's failure to substantially comply with either the letter or the intent of the *Davis-Bacon Act,* in preparing and offering the subject Contract for bids, resulted in the award to Respondent of a Contract that, as to wage provisions, ***was void ab initio.*** That upon the trial of this action before the Commissioner, Respondent was entitled to remedy said deficiency by introducing the testimony and other evidence necessary to prove the wage rates that actually prevailed in Elmira, when the subject Contract was let.

Such evidence, having been introduced to the Record by the testimony of Respondent's witnesses, Doughty and Maywood, union representatives and Henry Streeter a contractor local to the Contract area, and said evidence being

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uncontradicted, Respondent became entitled to recover not only the amount awarded by the Court of Claims, but also, the balance of its said wage claim, with respect to which it has filed a concurrent Petition for Certiorari.

Conclusion.

For the reasons heretofore shown, Respondent respectfully submits that the Government's Petition to review the award to Respondent of $7,363.22, should be denied; and the concurrent Petition by Contractor for a Writ of Certiorari to review the decision of the Court of Claims denying the balance of the Contractor's claims against the Government, should be granted.

Respectfully submitted,

JEROME BEAUDRIAS,
Attorney for Binghamton Construction Co. Inc., Petitioner in above entitled proceeding No. 78, and Respondent in above entitled and concurrent proceeding No. 65,
Office & P. O. Address,
83-85 Warburton Ave.,
Yonkers 2, New York.

MALCOLM A. MACINTYRE,
Of Counsel for Binghamton Construction Co. Inc., in both proceedings, and a member of the Bar admitted to practice before the Supreme Court of the United States,
20 Exchange Place,
New York, New York.

Dated: September 14, 1953.

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COPY

FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 65

THE UNITED STATES,

Petitioner,

v.

BINGHAMTON CONSTRUCTION CO. INC.

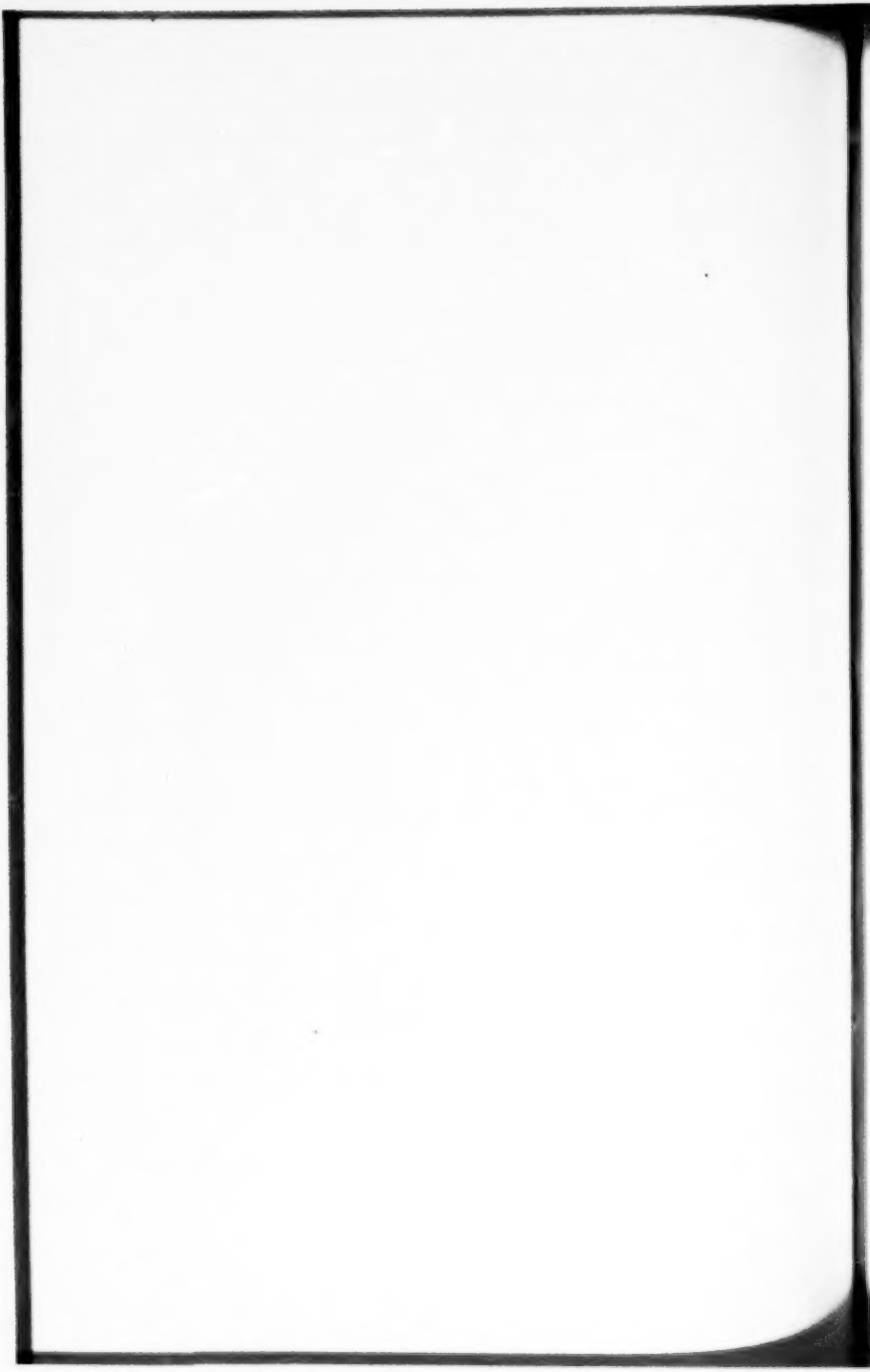
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR BINGHAMTON CONSTRUCTION CO. INC. RESPONDENT ABOVE NAMED.

JEROME BEAUDRIAS,
Attorney for Binghamton Construction Co. Inc., Respondent,
Office & P. O. Address,
83-85 Warburton Ave.,
Yonkers 2, New York.

MALCOLM A. MACINTYRE,
of Counsel.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 65

THE UNITED STATES,

Petitioner,

v.

BINGHAMTON CONSTRUCTION CO. INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR BINGHAMTON CONSTRUCTION CO. INC. RESPONDENT ABOVE NAMED.

Opinion Below.

The opinion of the Court of Claims of The United States was rendered on October 7, 1952, and is reported at 123 C. Cls. 804, 107 Fed. Supp. 712.

Jurisdiction.

The judgment of the Court of Claims was filed October 7, 1952 (R. 72).

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The Government's petition for a Writ of Certiorari was filed May 12, 1953 (R. 73) and was granted on October 12, 1953 (R. 75).

The Respondent's cross petition for a Writ of Certiorari upon the questions under review in the within proceeding, and upon other issues, was filed May 18, 1953, as proceeding No. 78, October Term, 1953 (R. 74) and has not yet been decided.

The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

Questions Presented.

1. Whether the statutory obligation of the Secretary of Labor to ascertain and submit for incorporation in the subject Contract, the wage rates prevailing in the Contract area, coupled with the positive assertion in the Contract that said duty had been duly performed, justified Respondent's reliance upon the accuracy of said wage rates in the preparation of its bid for the Contract, and rendered unnecessary its duplication of an investigation that allegedly had already been made.

2. Whether the preparation of the Contract's defective Wage Schedule from insufficient and erroneous data furnished by the Contracting Officer to the Labor Department, was adequate compliance with the provisions of the Davis-Bacon Act, in view of the promulgation by the Secretary of Labor of Regulation 503, specifying the procedure to be followed in complying with the statute.

3. Whether Respondent's damages for contract misrepresentation should be limited to the difference between the erroneous rates set forth in the Contract Wage Schedule and the amended rates set forth in the Secretary of

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Labor's Wage Determination of March 4, 1941, in view of the fact that in making said determination, the Secretary of Labor specifically limited the effective term of said ruling to a period of ninety (90) days ending June 2, 1941, the day prior to the final approval and award of the subject Contract to Respondent,—and also, that admittedly, from April 1, 1941 until June of 1942, the prevailing rate for Common Labor was $.625 per hour, or $.075 per hour higher than the $.55 per hour rate found to be prevailing by the said Determination of March 4, 1941.

Statute Involved.

Act of August 30, 1935, 49 Stat. 1011 (U. S. Code, Title 40, Secs. 276a & 276a-1) commonly known as the Davis-Bacon Act, the pertinent portions of which direct that the advertised specifications for every Federal contract for public improvement costing in excess of $2,000.00, upon which mechanics and/or laborers are employed,——

> "shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics, which shall be based upon the wages that *will be determined by the Secretary of Labor, to be prevailing* for the corresponding classes of laborers and mechanics employed in projects of a character similar to the contract work, in the—civil subdivision of the State—in which the work is to be performed." (Emphasis added.)

Departmental Regulation Involved.

Labor Department Regulation 503 relates to the manner of compliance by the Labor Department with the Davis-Bacon Act, and may be briefly summarized as follows,—

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Section 1—that all requests by Contracting Officers be referred to the Solicitor of Labor, who shall obtain the evidence for the Secretary's predetermination.

Section 2—sets forth the rules for determining what wage rates are prevailing in any given area.

Section 3—defines the preliminary information to be collected by the Solicitor from the department files.

Section 4—provides, that if data on file is insufficient, the Solicitor shall appoint a referee to conduct a field investigation and report.

Section 5a—Lists as those who may be appointed referee,—Labor Department employees, and also qualified persons not employed by the Labor Department, who are approved by the Secretary,—but said list *does not include* any employee of the War Department.

Sections 6 to 20 incl.—define the duties of the referee, the scope of the inquiry, the sources of information to be investigated, the holding of a public hearing, and the procedure with respect thereto, and instructions for the preparation of the referee's report.

Section 21—provides that this regulation supersedes all prior instructions.

Section 22—(not applicable to this case—did not become effective until 2/3/42).

Said Regulation 503 was prescribed by the Secretary of Labor, following the amendment on August 30, 1935, of the Davis-Bacon Act (Public Law No. 403, 74th Congress);

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became effective on September 30, 1935; and was in full force and effect in 1940 and 1941, when the subject Contract was advertised and let.

Provisions of the Contract Involved.

These are Article 17 of the Contract; Paragraph 1-31 of the Specifications; and Paragraph 1-12 of the Invitation to Bid for the subject Contract (Pltf's Ex. 1-A), as quoted in Petitioner's brief, *except for the omission* of a reference notation appearing at the end of Paragraph 1-12 of the Invitation to Bid, clearly showing that beyond satisfying themselves of the *"availability"* of labor, the investigation urged upon prospective bidders related to the matters described in the Specifications under the following paragraph headings,—

"1-12. *Local Materials and Facilities.*— * * * "
"1-13. *Physical Data.*— * * * "
"1-14. *Work Areas.*— * * * "

With said notation added, the final sentence of Paragraph 1-12 of the Invitation to Bid (Pltf's Ex. 1-A) is as follows,—

> " * * *. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work. (See paragraphs 1-12, 1-13, and 1-14 of the specifications.)"

Statement.

On *January 1, 1941,* in Elmira, New York, where the subject Contract was performed, the union scale for Car-

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penters was increased from $1.00 to $1.125 an hour, per the advance notice of said rate increase, sent on October 22, 1940 by the union to the District Engineer (R. 43, Finding 7).

The union scale for Laborers and Concrete Puddlers was $.55 per hour (Tr. Streeter 554).

On *January 22, 1941,* the Contracting Officer applied to the Secretary of Labor for a Wage Schedule to be incorporated in the subject Contract, and with said application, submitted his "Opinion" as to the Wage Rate prevailing in Elmira for each craft, based upon a field investigation allegedly made by him for that purpose and the details of which were incorporated in a written report submitted for each craft. The Contracting Officer erroneously found the prevailing Wage Rate for Carpenters to be $1.00 per hour, and for Laborers (including Concrete Puddlers) $.50 per hour (Deft's Ex. 1, Item 5).

On *January 31, 1941,* the Secretary of Labor responded by submitting a Wage Schedule that incorporated, *without change,* the rates recommended by the Contracting Officer, including therein the erroneous rates shown above for Carpenters and Laborers (R. 44, Finding 8).

On *February 18, 1941,* in response to a request for a Wage Schedule to be incorporated in the contract for a Federal Housing Project at Elmira, the Secretary of Labor, *pursuant to Regulation 503* of the Department of Labor, caused an investigation as to the Wage Rates prevailing in Elmira, to be made by a duly appointed Referee (R. 44, Finding 9 & Pltf's Ex. 27).

On *March 4, 1941,* following receipt of said Referee's report, the Secretary of Labor issued a Wage Determination for the Elmira Area, wherein the prevailing wage rate for Carpenters was found to be $1.125 per hour and for

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Laborers (including Concrete Puddlers) $.55 per hour (R. 44, Finding 9 & Pltf's Ex. 27).

Said Wage Determination by the Secretary of Labor contains the following preliminary statement,—

> "Since the prevailing rates of wages for the requested classifications re laborers and mechanics in the vicinity of Elmira *have not been determined recently under the Act,* the Secretary of Labor, in accordance with Department Regulations (Reg. 503, dated 9/30/35), appointed a referee to investigate the wages paid on such work in that locality. In the course of his investigation at Elmira and vicinity, the Referee interviewed various representatives of labor, contractors, local public officials and other parties believed to be interested." (Emphasis added.)

and the following ruling, to wit,—

> "*These rates are to be considered prevailing for ninety days from the date of this decision,* unless the decision is changed prior to the expiration of that period for contracts unawarded at that time." (Emphasis added.)

In issuing over her signature on January 31, 1941, the defective Wage Schedule [Pltf's Ex. 1(10)] incorporated in Respondent's Contract, the Secretary of Labor *did not state* that she had appointed the Contracting Officer a referee to investigate and report as to the wage rates prevailing in Elmira. Furthermore, the Contracting Officer admitted on cross-examination, that he had no authority to act for the Secretary of Labor (Tr. Marshall, p. 708).

On *March 29, 1941,* nearly four (4) weeks later, the subject Contract was advertised for bids, without correction

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of the Wage Schedule therein to conform to the Scretary's Wage Determination of March 4, 1941.

On *April 1, 1941,* the union scale for Laborers and Concrete Puddlers was increased from $.55 to $.625 an hour (R. 44, Finding 10).

On *April 29, 1941,* the Contracting Officer accepted bids on the subject Contract, without notifying the bidders of the errors in the Wage Schedule, or of the further rate increase for Laborers effective April 1, 1941,—although Carpenters and Laborers constituted the bulk of the labor force required to perform the Contract.

On *May 14, 1941* the Contracting Officer awarded the subject Contract to Respondent as the lowest bidder, subject to acceptance and approval by the War Department Division Engineer for the North Atlantic Division (R. 42, Finding 2).

On *June 3, 1941* the Contract was accepted and became binding upon the Government (R. 42, Finding 2), still without amendment of the Wage Schedule, despite the fact that *more than four* (4) *months had elapsed* since January 31, 1941, when said Wage Schedule had been obtained from the Secretary of Labor, and in the interim, the new Wage Determination of March 4, 1941, had been issued, and the Wage Rate for Laborers had been further increased on April 1, 1941.

On *June 5, 1941,* Respondent received formal notice to proceed with the work (R. 42, Finding 2).

On *June 16, 1941,* Respondent formally protested to the Contracting Officer, the errors in the Contract Wage Schedule and its inability to obtain Carpenters for less than $1.125 per hour, or Laborers and Concrete Puddlers for less than $.625 per hour (R. 44, Finding 11), the rates then prevailing in Elmira.

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When Respondent's protest and demand for an adjustment of compensation was rejected by the Contracting Officer, and said rejection was affirmed by the Chief of Engineers,—Respondent, following completion of the Contract, brought suit in the Court of Claims on various items, including a claim for damages for said contract misrepresentation, in the sum of $15,597.38, that being the difference in Respondent's labor cost, due to payment for Carpenters at the rate of $1.125 per hour instead of $1.00, and Common Labor at the rate of $.625 per hour instead of $.50 per hour.

Attention is called to the fact that *in 1942,* the rate for Carpenters employed on the subject Contract increased from $1.125 per hour to $1.25 per hour, and for Common Laborers from $.625 per hour to $.75 per hour.

Although Respondent paid said increased wage rates until the completion of the Contract in December, 1942, it has asserted no claim against the Government for said increased cost, because said rise in rates was one of the hazards that Respondent voluntarily assumed in contracting for the performance of this work (R. 15-16, p. 13).

Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that the Secretary of Labor's Determination on January 31, 1941 of the Schedule of Wages incorporated in Respondent's Contract, complied with the provisions of the Davis-Bacon Act.

2. In holding that insofar as said Wage Determination found the prevailing wage rate for Carpenters to be $1.00 and for Common Labor (including Concrete Puddlers) to be $.50, said Determination was correct when made.

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3. In holding that Respondent failed to establish any of the circumstances surrounding the wage rate increase from $.55 to $.625 obtained by the Union for unskilled Laborers and Concrete Puddlers on April 1, 1941.

4. In holding that it was impossible to determine from the record whether the Contracting Officer knew or should have known of said wage rate increase of April 1, 1941, at the time he awarded the subject Contract to Respondent.

5. In refusing to award Respondent the additional damages of $6,071.94 suffered by it by reason of said April 1, 1941 wage rate increase.

6. In refusing to award Respondent additional compensation of $19,924.40 per work performed and materials furnished in the completion of the subject Contract, on claims that are the subject of Respondent's collateral cross-petition for Writ of Certiorari, now pending before this Honorable Court, and not yet decided.

Summary of Argument.

Petitioner's entire brief and argument are predicated upon a misconception of Respondent's claim for damages, and of the Court of Claims' reasons for the partial award to Respondent.

There is and can be no dispute that the purpose of the Davis-Bacon Act and of the inclusion in the subject Contract and similar contracts, of a schedule of minimum wages to be paid employees,—was to benefit labor by placing a floor under wages and thus protect workers against sub-standard earnings.

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Furthermore, Respondent never has, and does not now, assert that the inclusion of said Wage Schedule in its Contract, was a warranty or representation by the Government, that Respondent could perform and complete the Contract at a labor cost measured by the wage rates therein set forth,—and in proof thereof, attention is called to the fact that although in June of 1942, the wage rate for Carpenters was increased from $1.125 to $1.25, and for Laborers from $.625 to $.75, and Respondent was obliged to pay said increased rates until the completion of the Contract in December of 1942, no claim has ever been asserted against the Government for said added and unanticipated cost.

We do contend, however, that upon the Secretary of Labor, and her designees, as enumerated in Section 5(a) of Labor Department Regulation #503, rested the obligation of ascertaining and incorporating in Respondent's Contract, the wage rates prevailing in the Contract area. We are certain that if a field investigation of the thoroughness called for by Regulation 503, had been made in preparation for the subject Contract, no errors in rates would have occurred,—and the accuracy of the Wage Determination of March 4, 1941, resulting from a thorough field survey by a qualified Referee, strongly supports that view.

We do not believe that the alleged survey and report of prevailing wage rates, furnished to the Labor Department by the Contracting Officer, and upon which the Wage Schedule for the subject Contract was based, was a satisfactory or legal substitute for the investigation called for by Regulation 503, or satisfied either the letter or the intent of the Davis-Bacon Act,—and we submit that the appointment in February, 1941 by the Secretary of Labor, of a Referee to make a proper survey of the Contract area, and the act of the Secretary in making a new wage determination for said area on March 4, 1941 (only thirty-

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two days after her ruling of January 31, 1941, issuing the Wage Schedule incorporated in Respondent's Contract), and finally, the opening statement inserted in said Determination of March 4, 1941, to the effect that prevailing wage rates in said area had not been recently determined "under the Act",—strongly support our belief that with respect to the subject Contract, the measures taken to comply with the statute *were void ab initio.*

However, until the trial of this action, Respondent had no reason to suspect that the wage rates in the Contract Wage Schedule were not the product of the thoroughgoing investigation directed by the Act and by Regulation 503,—but on the contrary regarded the statements contained in Article 17 of the Contract and Paragraph 1-31 of the Specifications, as affirmative representations that the statutory requirements had been duly complied with.

Therefore, since to Respondent's knowledge, the supply of labor in all of the required classifications was adequate, Respondent did not make an independent check of prevailing wage rates, but relied upon the Contract Wage Schedule as being an accurate statement of the rates being paid to the great majority of workers in each labor classification.

We submit that the contractor was entitled to rely upon said data in computing his bid, since there was no reason to believe that in a matter so vital to the interests of employees that the Legislature has sought to protect, there would be anything less than the greatest care exercised.

Certainly, as Petitioner's counsel has pointed out in his brief, and as the Court below found in its decision (R. 45, Finding 16), Respondent could have made an independent check of prevailing wage rates,—but obviously no investigation less thorough than the one that had presumably been already made by the Secretary of Labor, would be

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of any value for comparison with the rates set forth in the Contract.

Under the circumstances, we contend that Respondent was altogether justified in its decision not to make any such independent investigation, but instead, to rely upon the truth and accuracy of the Contract Wage Scale.

We further contend, and the Court below has concurred with us, that when, at the commencement of Contract operations, it was discovered that the prevailing scale for Carpenters and for Common Labor was, and had been for more than two months, $1.125 and $.625 respectively, instead of $1.00 and $.50 respectively as set forth in the Contract, we were entitled to claim a Contract misrepresentation entitling us to damages measured by the difference between Respondent's labor cost computed at the said prevailing rates of $1.125 for Carpenters and $.625 for labor, and what said cost would have been if same had been computed at the rate of $1.00 an hour for Carpenters and $.50 for labor.

The Court below concurred in our claim of Contract misrepresentation, but would award to Respondent as damages, only the difference between $1.00 and $1.125 for Carpenters and $.50 and $.55 for Common Labor, upon the ground that the Contracting Officer knew or should have known of the Secretary of Labor's second Wage Determination of March 4, 1941, and should have incorporated same in Respondent's Contract. Its failure to do so entitled Respondent to recover to that extent, and the Court below thereupon awarded to Respondent, $7,363.22 for said damages.

The Court below, however, refused to allow Respondent the additional damages of $6,071.94 claimed by Respondent because on April 1, 1941 (three weeks after the Wage Determination of March 4, 1941, had found the prevailing

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rate for Common Labor to be $.55 per hour) said Common Labor rate was increased to $.625 per hour.

Respondent contended, that since said increase had occurred more than two months prior to the final approval and award of the Contract on June 3, 1941, the Contracting Officer knew, or should have known of said increase, and should have taken action to amend the schedule accordingly.

The Court below, however, refused to grant the relief demanded, and under Point II of this Memorandum, we have discussed the reasons why we believe this Honorable Court should reverse its decision and grant Respondent said additional damages.

ARGUMENT.

I.

The failure of the Contracting Officer to conform the Contract Wage Schedule to the wage determination of March 4, 1941 resulted in a Contract misrepresentation that justifies the Court of Claims award to respondent.

A leading authority and case in point is,—

> *Albert & Harrison Inc.* v. *United States,* 107 C. Cls. 292, 68 Fed. Sup. 732 Certiorari denied 331 U. S. 810.

In said case, the advertised specifications contained a wage schedule wherein the rate for bricklayers was shown to be $1.50 per hour.

However, subsequent to inviting bids, but prior to the award of the Contract, a new wage determination was made for the contract area, wherein the prevailing rate

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for bricklayers was found to be $1.75 per hour. The Court held that the Contracting Officer's failure to correct the contract wage schedule to show said increased rate, constituted a contract misrepresentation for which plaintiff was awarded damages.

In the following respects, the facts pertaining to Respondent's wage claim, are more favorable to a recovery than those found sufficient for an award in the cited case,—

1. *In the cited case*—the contract wage schedule was true when made.
   In this case—when the original Wage Determination was made on January 31, 1941, the prevailing rates for Carpenters and Common Labor were higher than those shown in the Contract Wage Scale.

2. *In the cited case*—the Contract recited that the Secretary of Labor's Wage Determination had been made October 26, 1940. Therefore, when plaintiff bid for the contract in March of 1941, he had notice that 5 months had elapsed since said Determination had been made, with consequent opportunity to check prevailing rates had he desired to do so.
   In this case—there was nothing in the subject Contract to indicate when the Contract Wage Schedule had been determined, and no reason for Respondent to suspect that same might be out of date.

3. *In the cited case*—the new wage determination increasing the scale for bricklayers to $1.75 per hour, occurred only 19 days prior to the award of that contract, a time sufficiently short so that the Contracting Officer might be excused for failure to learn of same.

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In this case—the Wage Determination of March 4, 1941 and the subsequent increase in Common Labor rates that occurred on April 1, 1941, occurred from 6 to 10 weeks prior to the conditional award of the Contract to Respondent on May 14, 1941, and from 9 to 13 weeks prior to the final approval of same on June 3, 1941, during which period of time, the Contracting Officer learned or should have learned of said rate changes.

4. *In the cited case*—the Court found that the contractor did not even visit the site of the work prior to the submission of its bid, but found that fact no obstacle to the granting of an award. *In this case*—Respondent's officers examined the contract site prior to bidding, but saw no need to repeat an investigation of prevailing wage rates that they believed had already been exhaustively made by the Secretary of Labor.

Although counsel for the Government, in his brief, charges that Respondent was fatally remiss in failing to investigate independently, the wage rates prevailing in the Contract area, it has repeatedly been held that a contractor should not be deemed negligent in accepting as true, without independent examination, the results incorporated in a contract, of an investigation made by the owner.

Hallerbach v. *United States,* 233 U. S. 165, 172;
Christie v. *United States,* 237 U. S. 234, 242;
United States v. *Spearin,* 248 U. S. 132, 136;
United States v. *Utah Stage Co.,* 199 U. S. 414, 424.

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To the same effect, see:

United States v. *Atlantic Dredging Co.*, 253 U. S. 1;

Kingston, et al v. *L. P. & J. A. Smith Co.* (C. C. A. 6th Circuit) 114 Fed. Rep. 294

That the Petitioner has generally recognized and acknowledged the existence of this principle, is evidenced by a fact of which we respectfully submit the Court may take judicial notice, to wit,—that *shortly after the letting of the subject Contract,* the United States Government's standard form of contract and specifications, used for the subject Contract, was amended to include the following notice,—

> "The contractor will be expected to make his own investigations and determine for himself the wage rates which may prevail during the period of the contract. Wage rates which may be found to exceed the minimum herein set forth, will not be a basis for claim against the United States for added costs."

Attention is also respectfully called to the following citation by Petitioner's counsel, at page 28 of his brief, to wit,—

A. J. Paretta Co. v. *United States,* 109 C. Cls. 324 Certiorari denied, 333 U. S. 832.

In said case, the contract under review was awarded on November 25, 1942, approximately a month prior to the completion of Respondent's Contract, and the wage provisions therein set forth contained the following specific warning,—

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> "The specified wage rates are minimum rates only, and the Government will not consider any claim for additional compensation made by the contractor because of payment by the contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the contractor."

We respectfully submit, that if for the contract given to the A. J. Paretta Co., the Government deemed the inclusion of said warning clause necessary, to cast upon the contractor the burden of making his own investigation of prevailing wage rates,—there is no basis for the arguments of Petitioner's counsel, that Respondent's Contract, *devoid of any such warning clause,* nevertheless casts the same burden upon Respondent.

Under Point II of his brief, counsel for Petitioner argues that the Wage Determination of March 4, 1941, having been prepared and issued for inclusion in a Federal Housing Contract, may not also be regarded as superseding the erroneous Wage Determination of January 31, 1941 incorporated in the subject Contract, without the specific consent and agreement of the Secretary of Labor.

However, said arguments disregard the statement in said March 4th Determination (Pltf's Ex. 27), that the rates therein set forth are to be considered prevailing "for ninety days from the date of this decision, unless the decision is changed prior to the expiration of that period *for contracts unawarded at that time*". (Emphasis added.)

Petitioner's counsel also suggests that Carpenters employed upon the said Housing Contract, might well require a degree of skill greater than that needed by Carpenters

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engaged in building forms for concrete structures, and therefore, be entitled to receive a higher rate of pay. However, Respondent's witness Warren Morgan Mayhood, Recording Secretary and Business Agent for Carpenters Local Union No. 532 of Elmira, N. Y. (Tr. 1186), testified upon the trial of this action, that in the trade of "Carpentry", there are only five (5) wage differentials recognized or permitted by the Union, to wit,—the agreed Union wage rate paid to *all* Journeymen-Carpenters, and the varying percentages thereof paid to First, Second, Third and Fourth year Apprentices (Tr. 1196-1198).

We respectfully submit, that for all of the foregoing reasons, the Government's Petition should be dismissed.

II.

Having ruled that the wage rate of $.50 per hour for Common Labor shown by the erroneous Contract Wage Schedule, was a misrepresentation for which respondent could recover damages,—the Court below erred in awarding less than one half of the damages caused by said misrepresentation.

The Court below awarded Respondent the difference between the erroneous rate of $.50 per hour for Common Labor set forth in the Contract Wage Schedule, and the rate of $.55 per hour found to be prevailing by the Wage Determination of March 4, 1941 (R. 68), upon the premise that on March 29, 1941, when the Contracting Officer advertised for bids on the subject Contract, he knew or should have known, of the Wage Determination of March 4th, and his failure to correct the Contract Wage Schedule to conform to same, constituted a misrepresentation of the true facts (R. 68).

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The Court also found, that on and after April 1, 1941, the prevailing wage rate for Common Labor advanced to 62.5¢ per hour, and that Respondent was obliged to pay said increased rate when it started to perform the Contract on June 3, 1941 (R. 44, Finding 11).

However, despite said finding, the Court refused to award Respondent the additional damages caused by said rate increase from 55¢ per hour to 62.5¢ per hour, stating as its reason for said refusal that,—

> "• • • it is impossible to determine whether the District Engineer knew or should have known of its existence (i.e., the increase in rate to 62.5¢) at the time he awarded this contract to plaintiff" (R. 68).

We respectfully submit that the Court's error in so ruling, is demonstrated by the following,—

1. If the District Engineer was chargeable with knowledge of the Wage Determination of March 4, 1941, fixing the Common Labor rate at 55¢ per hour, *he was also chargeable with the knowledge* that in said Wage Determination the Secretary of Labor specifically ruled that,—

> *"These rates are to be considered prevailing for ninety days from the date of this decision* (March 4, 1941), unless the decision is changed *prior* to the expiration of that period for contracts unawarded at that time" (Pltf's Exhibit 27). (Emphasis added.)

Said maximum period of ninety (90) days expired on *June 2, 1941,* and therefore, when Respondent was awarded the Contract *on May 14, 1941* (R. 42, Finding 2) by the District Engineer—*subject to the approval of his superi-*

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ors—the District Engineer knew, or should have known, that *71 days* of said 90-day period had already expired, and that it would take most, if not all, of the remaining 19 days to obtain said approval.

Therefore, on June 3, 1941, when the Contract became binding upon the parties, through the endorsement thereof by the Division Engineer (R. 8 and R. 42, Finding 2) the Contracting Officer knew, or should have known, that *the Secretary of Labor's March 4th Wage Determination for the Contract Area, had lapsed the previous day.*

Certainly at that time—if not earlier—a due compliance with the letter and intent of the *Davis-Bacon Act,* required that the Contracting Officer apply to the Secretary of Labor for a new wage determination. Had he done so, the Labor Department's investigation would have found a 62.5¢ hourly rate to be prevailing for Common Labor and Respondent's loss need never have occurred.

We respectfully submit that the violation of the statute disclosed by the foregoing undisputed facts, should alone be sufficient to justify Respondent's claim.

2. That the Contracting Officer had personal knowledge,—long before April 1, 1941,—of the Common Labor wage rate increase to 62.5¢ per hour that occurred on that date, is disclosed by the following evidence,—

a. The Contracting Officer's signed Report to the Labor Department, of wage rates prevailing in the Contract area (Deft's Ex. 1, encl. 5), *dated January 10, 1941,* contains the following statement,—

> "* * * The union states it is contemplating a new rate of $0.625 per hr. to be effective April 1, 1941. * * *"

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b. Also, Respondent's witness, James F. Doughty, who in 1940 and 1941, was Business Representative of the Elmira Building and Construction Trades Council, testified that on or about November 15, 1940, the Laborers' Local Union No. 1355 of Elmira, N. Y. advised the Contracting Officer by letter, that the wage rate for Common Labor would be increased to 62.5¢ per hour, effective April 1, 1941 (Testimony, pp. 428-429 and 431).

In the light of the foregoing facts, we respectfully submit that the refusal of the Court below to allow Respondent as damages, the difference between the rate of 55¢ for Common Labor found by the decision of March 4, 1941, and the 62½¢ rate that became effective April 1, 1941, because of the failure of the Secretary of Labor to make a Wage Determination acknowledging said increased rate of 62½¢,—is to permit the Government to benefit by the failure and refusal of the Contracting Officer to request such determination, despite the obvious need for same if the provisions of the Davis-Bacon Act were to be complied with.

We therefore respectfully urge that this Court amend the decision of the Court of Claims by awarding to Respondent, the additional damages of $6,071.94 that Respondent is entitled to receive by reason of said labor rate increase of April 1, 1941.

III.

The wage determination of January 31, 1941, incorporated in the subject Contract, did not comply with the requirements of the Davis-Bacon Act.

In substantiation of said charge, the attention of the Court is respectfully called to the following uncontroverted facts,—

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1. No preliminary Field Investigation and Report of the wage rates prevailing in the Contract area, was made by a duly appointed and qualified referee, as directed by *Regulation 503, Sections 4 and 5 (a)*. Instead, the Wage Schedule incorporated in the subject Contract was predicated upon an alleged field investigation by the *Contracting Officer* (Tr. pp. 700-708), who admittedly had no authority to perform said duty (Tr. p. 708) with which the Secretary of Labor is specifically charged by the *Davis-Bacon Act*, and who very certainly was not one of those designated by *Regulation 503, Section 5(a)* as qualified to engage in the predetermination of prevailing wage rates.

2. In addition to the technical objection that he was not qualified to act,—the Contracting Officer's report of his investigation (Deft's Ex. 1, encl. 5) clearly shows that he made no attempt to conduct his investigation in the manner and with the thoroughness directed by *Regulation 503*, and more particularly, that he neglected to hold the Public Hearing directed by *Sections 11 to 19* inclusive of said Regulation.

3. Moreover, even the inadequate evidence of prevailing wage rates incorporated in the Contracting Officer's said report, became suspect when, upon the trial of this action, James F. Doughty, Business Representative of both the Carpenters Union, Local 532 of Elmira (Tr. p. 425) and of the Elmira Building and Construction Trades Council (Tr., p. 402) at the time said field investigation was allegedly made,—and also Henry W. Streeter, a prominent Elmira contractor, by separate affidavits (attached to Pltf's Ex. 11) and by their sworn testimony, *categorically denied* that they had either held the conferences, or expressed the opinions re prevailing wage

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rates, that were reported by the Contracting Officer (Tr. Doughty, pp. 437-438 and 443; Streeter, pp. 563-564).

4. The Secretary of Labor acknowledged the inadequacy of said Wage Determination of January 31, 1941, incorporated in Respondent's Contract when, on March 4, 1941, on issuing a new Wage Determination for the Contract area (Pltf's Ex. 27), she stated in the second paragraph thereof, that her action was taken because the prevailing wage rates for the Elmira area "have not been determined recently *under the Act*". (Emphsis added.)

We respectfully submit that upon the Contracting Officer rested the obligation of complying with the letter and intent of said law, and the foregoing uncontradicted facts demonstrated an indifference to the fulfillment of his duties, that not only resulted in misleading Respondent to its serious loss and damage, but also might well have proved seriously detrimental to the interests of the workmen said law was designed to protect.

We believe that the legal effect of the Contracting Ofcer's actions was to render the Wage Schedule of January 31, 1941 a nullity, and the subject Contract therefore deficient in this essential respect.

Respondent should therefore be entitled to supply said deficiency with the best available evidence, and as hereinbefore shown, upon the trial, adduced testimony establishing without contradiction, that on and after April 1, 1941, more than two months prior to the start of work on the subject Contract, the prevailing scale for Carpenters in the Contract area was $1.125 and for Common Labor was $.625.

The Court below awarded Respondent a portion of its damages, because of the Contracting Officer's failure to

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amend the Contract Wage Schedule to conform to the Secretary of Labor's March 4, 1941 Wage Determination.

The Court below, however, refused to award Respondent the balance of its damages, amounting to $6,071.94, for the reason that it could not determine whether the Contracting Officer knew or should have known at the time of the award of this Contract to Respondent, that the prevailing wage rates for Common Labor had increased to $.625 some six weeks earlier, and also, there was no evidence of a Wage Determination by the Secretary of Labor, finding said rate to prevail.

We respectfully submit that under Point II of this brief, it has been shown that the record contains a considerable quantity of uncontradicted evidence proving that the Contracting Officer had knowledge of said rate increase.

However, quite apart from said evidence of his knowledge, we submit that the foregoing facts disclose that he knew, or should have known, when he finally awarded the Contract to Respondent on June 3, 1941, that same was lacking a valid Wage Schedule, due to the fact that the original defective schedule, if not *void ab initio,* had been superseded by the second Wage Determination of March 4, 1941,—and said second Wage Determination expired by limitation of time on June 2, 1941, the day prior to the final award of Respondent's Contract.

Had the Contracting Officer been disposed to fulfill his obligations, he should have immediately applied for a new Wage Schedule to be incorporated in the subject Contract, and had he done so, the reasons expressed by the Court below for denying a portion of Respondent's Wage Claim, would have ceased to exist.

That the said Contracting Officer continued to be consistent in refusing to perform his Contract and statutory

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obligations, should not be the cause of denying Respondent the recovery of a substantial portion of its loss and damages.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Government's Petition herein should be dismissed—and that with respect to the judgment of the Court below, action should be deferred until determination of Respondent's cross-petition for a Writ of Certiorari (filed May 18, 1953 as Proceeding No. 78, October Term, 1953), upon both the questions under review in this proceeding, and also Respondent's claims to $19,974.40 of additional compensation to it for work performed and materials furnished in the completion of the subject Contract.

November, 1953.

Respectfully submitted,

JEROME BEAUDRIAS,
Attorney for Binghamton Construction Co. Inc., Respondent,
Office & P. O. Address,
83-85 Warburton Ave.,
Yonkers 2, New York.

MALCOLM A. MACINTYRE,
of Counsel.

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FILED
MAR 23 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 65

THE UNITED STATES,

Petitioner,

v.

BINGHAMTON CONSTRUCTION CO. INC.

On Writ of Certiorari to the United States Court of Claims.

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On March 8, 1954, this Honorable Court rendered its Opinion reversing the Judgment of the Court of Claims of the United States rendered on October 7, 1952, granting Respondent damages in the sum of $7,363.22, because of a Contract misrepresentation due to an erroneous Wage Schedule incorporated in said Contract.

Respondent respectfully prays for a rehearing in accordance with the provisions of Rule 33 of the Rules of this Court, upon the questions and for the reasons hereinabove set forth

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I.

By its judgment of reversal, this Honorable Court has ratified the contracting officer's usurpation of authority given only to the Secretary of Labor by the Davis-Bacon Act.

On March 29, 1941, when bids for the subject Contract were invited, the Secretary of Labor's most recent determination of the prevailing wage rates for the City of Elmira, was her Decision of March 4, 1941, finding the prevailing hourly wage rate for carpenters to be $1.125 and for laborers to be $.55.

Although said Decision resulted from a request by the Federal Works Agency, for one of its projects in said City, the Davis-Bacon Act contains no provisions restricting a Wage Determination for a given area to any one contract,—and the wording of said Decision of March 4th, clearly shows the Secretary's intention that same was to supersede any and all prior Decisions for Elmira,[1] including that of January 31, 1941, issued for Respondent's Contract, wherein the prevailing hourly wage rate for carpenters was found to be $1.00 and for laborers to be $.50.

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1. The Secretary of Labor's Wage Decision of March 4, 1941, contains the following preliminary statement,—

> "Since the prevailing rates of wages for the requested classifications re laborers and mechanics in the vicinity of Elmira *have not been determined recently under the Act*, the Secretary of Labor, in accordance with Department Regulations (Reg. 503, dated 9/30/35), appointed a referee to investigate the wages paid on such work in that locality. In the course of his investigation at Elmira and vicinity, the Referee interviewed various representatives of labor, contractors, local public officials and other parties believed to be interested." (Emphasis added.)

and the following ruling to wit,—

> "*These rates are to be considered prevailing for ninety days from the date of this decision,* unless the decision is changed prior to the expiration of that period for contracts unawarded at that time." (Emphasis added.)

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If, as determined by the Court below, the Contracting Officer knew or should have known of the Secretary's said Decision of March 4th, before inviting bids for Respondent's Contract on March 29th,—then, in effect, it was the Contracting Officer and not the Secretary of Labor who determined the minimum wage rates incorporated in Respondent's Contract, when he arbitrarily permitted the outdated, superseded and erroneous Wage Rates of January 31, 1941 to remain in the Specifications,—and by doing so, misled Respondent and brought about the loss for which the Court below awarded judgment.

We respectfully submit, that neither said right of election exercised by the Contracting Officer in the instant case, nor the resulting insertion of *conflicting* Minimum Wage Schedules in two contracts being performed concurrently in the same area, was contemplated when the Davis-Bacon Act was made law.

II.

The issue of law defined in the opening paragraph of the opinion and decided adversely to respondent by this Honorable Court, is not the issue presented for determination by Paragraph 5 of the Amended Petition[2] and consistently urged by respondent.

Respondent has never claimed that in bidding for the subject Contract it relied upon, or was entitled to rely upon, the erroneous Contract Wage Schedule *as a representation or warranty of the wages it would be required to pay in performing the work.* This is evidenced by the fact that although in mid-contract, the hourly wage rate for carpenters was increased from $1.125 to $1.25 and for

2. (R. 37-38).

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laborers from $.625 to $.75, Respondent made no claim for such increase.[3]

Respondent does contend—that since the Contract and Specifications asserted that the Minimum Wage Schedule conformed to the requirements of the Davis-Bacon Act, *Respondent had the right to and did rely upon the accuracy and truth of said statement*—to its ultimate loss and damage in the sum of $7,363.22, when, as discussed under Point I above, said representation proved to be false.

By the adoption of Labor Department Regulation #503, for the administration of the Act, the Secretary of Labor has set a standard for the thoroughness of the investigation deemed necessary to determine the wage rates prevailing in any given area,—and we respectfully submit, that *the Contract assertion of due compliance with the Act was in effect, a representation that the Contract Wage Schedule reflected the wage rates found to be prevailing in the Contract area, by an investigation made in conformance to said Regulation #503.*

While it is true that Respondent could have discovered the errors in the Contract Wage Schedule by an independent investigation prior to preparation of its bid, said Contract representation led it to believe that any such investigation would be superfluous.

This Court has heretofore repeatedly held that a contractor was not to be deemed negligent in accepting as true, without independent examination, the results incorporated in a contract, of an investigation alleged to have been made by the owner.[4]

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3. (R. 16—Com. Finding 13).

4. *Hallerbach* v. *United States*, 233 U. S. 165, 172; *Christie* v. *United States*, 237 U. S. 234, 242; *United States* v. *Spearin*, 248 U. S. 132, 136; *United States* v. *Utah Stage Co.*, 199 U. S. 414, 424; *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1; *Kingston, et al.* v. *L. P. & J. A. Smith Co.* (C. C. A. 6th Circuit), 114 Fed. Rep. 294.

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We respectfully submit that the facts warrant the application of said Rule to the instant case—and an affirmance of the judgment of the Court below.

III.

By its judgment of reversal, this Honorable Court has denied to Respondent the relief heretofore approved and allowed with respect to a claim based upon similar facts.

We respectfully submit, there is no essential difference between the facts presented in the instant case and those that prevailed with respect to the Labor Claim in *Albert & Harrison Inc.* v. *United States,* 107 C. Cls. 292, 68 Fed. Sup. 732, certiorari denied, 331 U. S. 810.

In the interest of justice, it would appear that Respondent should be afforded the relief granted by the Court below, in conformance with and reliance upon the authority of said case.

CONCLUSION.

For the above reasons, it is respectfully urged that a rehearing be granted in order that complete justice may be effected.

Respectfully submitted,

JEROME BEAUDRIAS,
Counsel for Respondent,
the Petitioner herein,
83-85 Warburton Ave.,
Yonkers 2, New York.

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Certificate of Counsel.

I, JEROME BEAUDRIAS, Counsel for Binghamton Construction Co. Inc., the petitioning Respondent above named, do hereby certify that the foregoing Petition for a rehearing of this cause is presented in good faith and not for delay.

JEROME BEAUDRIAS,
Counsel for Respondent,
the Petitioner herein.

March, 1954.

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SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1953.

The United States, Petitioner, *v.* Binghamton Construction Co., Inc.	On Writ of Certiorari to the United States Court of Claims.

[March 8, 1954.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This case is before us on writ of certiorari to the Court of Claims. The question presented is whether the schedule of minimum wage rates included in a Government construction contract, as required by the Davis-Bacon Act,[1] is a representation or warranty as to the prevailing wage rates in the contract area. We hold that it is not.

The Davis-Bacon Act requires that the wages of workmen on a Government construction project shall be "not less" than the "minimum wages" specified in a schedule furnished by the Secretary of Labor. The schedule "shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing" for corresponding work on similar projects in the area.[2] The Act also pro-

[1] Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494, as amended by the Act of August 30, 1935, c. 825, 49 Stat. 1011, 40 U. S. C. §§ 276a–276a–5.

[2] 49 Stat. 1011, 40 U. S. C. § 276a:

". . . That the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, . . . of public buildings or public works of the United States . . . which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics

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vides for penalties, including termination of the contract, if it is found that the contractor is paying less than the schedule rate.[3]

The respondent, a construction company, was the successful bidder for a Government flood control project on the Chemung River at Elmira, New York. On January 31, 1941, at the request of the Corps of Engineers, the Secretary of Labor submitted a schedule of minimum wages for the project. This schedule set the minimum hourly wage rate at $1.00 for carpenters and $.50 for laborers. On March 29, 1941, the Corps of Engineers issued an invitation for bids.[4] Pursuant to the Davis-Bacon Act, *supra*, the Secretary's wage schedule was included in the contract specifications furnished to respond-

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which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed . . . ; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work . . . the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications. . . ."

[3] 49 Stat. 1011, 40 U. S. C. § 276a–1.

[4] The invitation provided in part:

"*Investigation of Conditions.*—Bidders are expected to visit the locality of the work and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, availability of labor, uncertainties of weather, and other contingencies. In no case will the Government assume any responsibility whatever for any interpretation, deduction, or conclusion drawn from the examination of the site. . . . Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of responsibility for estimating the difficulties and costs of successfully performing the complete work."

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ent, prior to the computation of its bid.[5] On May 14, 1941, respondent's bid of $232,669.30 was accepted and a written contract was executed, incorporating the specifications and subject only to formal approval by the Government. The contract provided that respondent was to pay wages "not less than those stated in the specifications . . ."; for breach of this provision, the Government was authorized to terminate the contract.[6] On June 3, 1941, the contract was formally approved; and

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[5] The specifications contained the following provision:

"1-31. *Wage and Labor Provisions.* (*a*) The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work. In accordance with Article 17 of the contract, employees at the site shall be paid not less than these wages as listed below:

"Designation	*Wage rate—hourly*
Carpenters, journeymen	$1.00
. . .	.
Laborers, unskilled	0.50
Laborers, concrete puddlers	0.50"

[6] Article 17 of the contract reads as follows:

"(*a*) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work . . . the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications. . . .

"(*b*) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby."

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on June 5, 1941, respondent received notice to proceed with the work.

On October 22, 1940, the local carpenters' union had notified the contracting officer that the hourly wage scale for carpenters would be increased from $1.00 to $1.125 as of January 1, 1941. On March 4, 1941, some three weeks prior to the invitation for bids on the project involved here, the Secretary of Labor had furnished another Government agency, the Federal Works Agency, a schedule of minimum wages for inclusion in the specifications for a federal housing project in Elmira. This schedule set the minimum hourly wage rate at $1.125 for carpenters and $.55 for laborers. On April 1, 1941, the union hourly rate for laborers was increased from $.55 to $.625.

In the performance of the contract, respondent paid the union rates then in effect—$1.125 for carpenters and $.625 for laborers. On June 16, 1941, respondent protested to the contracting officer that it was unable to obtain workmen at the rates specified in the contract schedule and demanded an adjustment of compensation, on the theory that the schedule was an affirmative representation as to the prevailing wage rates in the area and that respondent was entitled to rely on this representation in the computation of its bid. The contracting officer denied relief and the Chief of Engineers dismissed respondent's appeal.[7]

Respondent thereupon brought this action in the Court of Claims, seeking damages for the alleged misrepresenta-

[7] The Chief of Engineers advised respondent: "There is no authority in law for this office to question the correctness of any determination made by the Secretary of Labor pursuant to the provisions of the above cited act [the Davis-Bacon Act]." Later, in refusing to reconsider respondent's appeal, the Chief of Engineers stated: ". . . The contract by Article 17 and by paragraph 1-31 of the specifications provides that wages not less than those specified shall be paid. The contract makes no representation as to the availability of labor nor

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tion as well as other relief. The court specifically found that an investigation by respondent would have revealed that the prevailing rates were higher than the rates specified in the schedule.[8] Nevertheless, it allowed respondent a recovery of $7,363.22, consisting of the difference between the rates specified in the contract schedule ($1.00 for carpenters and $.50 for laborers) and the rates specified in the Secretary of Labor's later determination for the Federal Works Agency ($1.125 for carpenters and $.55 for laborers).[9] The court held that the contract schedule misrepresented—although inadvertently—the prevailing wage rate in the Elmira area, since, prior to the invitation to bid, the Secretary of Labor had made a higher determination and the contracting officer could have ascertained that fact. Respondent, the court held, was entitled to rely on the schedule "as the Secretary's *latest* determination—as a representation of the wages it would have to pay when the work was to be done." [10] We granted review [11] because of the obvious importance

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as to the actual wage scales that would be in effect. The alleged increased costs did not result from your contract obligation but from economic conditions which are ordinary contingencies contemplated under the terms of the contract."

[8] 123 Ct. Cl. 804, 810–811:

"If plaintiff's president had investigated wage rates, he could have ascertained that the prevailing rate for carpenters was $1.125 per hour, and that the prevailing rate for unskilled labor was $.55 per hour, with an advance to $.625 per hour, effective as of April 1, 1941. Also, before inviting bids on this project, the District Engineer could have ascertained that the Secretary of Labor had made a new determination of the prevailing wage rates for Elmira on March 4, 1941."

[9] On all other claims of respondent, the Court of Claims denied recovery. That part of the court's judgment is the subject of respondent's petition for writ of certiorari in No. 78, this Term.

[10] 123 Ct. Cl. 804, 836–837, relying on *Albert & Harrison, Inc.* v. *United States*, 107 Ct. Cl. 292, 308–309, cert. denied, 331 U. S. 810.

[11] 346 U. S. 809.

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of the decision in the administration of the Davis-Bacon Act.

The Act itself confers no litigable rights on a bidder for a Government construction contract.[12] The language of the Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects.[13] Congress sought to accomplish this result by directing the Secretary of Labor to determine, on the basis of prevailing rates in the locality, the appropriate minimum wages for each project. The correctness of the Secretary's determination is not open to attack on judicial review.[14]

The Court of Claims nevertheless awarded respondent damages on the ground that the Government, through the Corps of Engineers, had falsely represented the prevailing rates in the Elmira area. The short answer to this is that the Government made no such representation. Neither the contract nor the specifications refers to "prevailing" rates. The contract speaks only of "wage rates not less than those stated in the specifications." [15] The specifica-

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[12] Compare 49 Stat. 1011, 40 U. S. C. § 276a–2 (b), conferring a right of action on employees to recover from the contractor the amount due the employees under the minimum wage schedule.

[13] *United States* v. *Morley Const. Co.*, 98 F. 2d 781, 788, cert. denied, 305 U. S. 651; *Gillioz* v. *Webb*, 99 F. 2d 585; *Winn-Senter Const. Co.* v. *United States*, 110 Ct. Cl. 34, 61; cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128; *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507. See also H. R. Rep. No. 1756, 74th Cong., 1st Sess.; S. Rep. No. 1155, 74th Cong., 1st Sess.; S. Rep. No. 1445, 71st Cong., 3d Sess.

[14] *Alliance Const. Co.* v. *United States*, 79 Ct. Cl. 730. Cf., concerning the related Walsh-Healey Public Contracts Act, *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, and *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501.

[15] See note 6, *supra*.

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tions in turn speak only of "minimum wage rates applicable in the locality." [16] The only reference to "prevailing" rates appears in the statute itself, which provides that the minimum wage rates are to be "based upon . . . the wages . . . determined by the Secretary of Labor to be prevailing." But this provision in the Act cannot convert the contractor's obligation to pay not less than the minimum into a Government representation that the contractor will not have to pay more. On its face, the Act is a minimum wage law designed for the benefit of construction workers. The Act does not authorize or contemplate any assurance to a successful bidder that the specified minima will in fact be the prevailing rates. Indeed, its requirement that the contractor pay "not less" than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation in computing its bid cannot be said to have been justified.

The Government further contends that the Secretary of Labor was justified in fixing different minimum rates for the housing and flood control projects according to the degree of skill required by each project, and that respondent is estopped to claim misrepresentation because of its failure to make an investigation of labor costs before submitting its bid. Because of our disposition of the case, we find it unnecessary to reach these issues. The portion of the judgment appealed from by the Government is

Reversed.

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[16] See note 5, *supra*.

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